

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No 543.

THE UNITED STATES, APPELLANT,

vs.

THE RIO GRANDE DAM AND IRRIGATION COMPANY  
AND THE RIO GRANDE IRRIGATION AND LAND COM-  
PANY, LIMITED.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW  
MEXICO.

## INDEX.

	Original.	Print.
Caption.....	1	<i>1a</i>
Stipulation to docket cause and set same for hearing and as to record on appeal .....	1	<i>1a</i>
Order in pursuance of foregoing stipulation.....	4	<i>2a</i>
Order setting cause for hearing.....	5	<i>2a</i>
Transcript from district court.....	7	1
Bill of complaint.....	7	1
Order for temporary injunction, etc.....	14	8
Certified copy of order for temporary injunction, etc .....	15	9
Marshal's return of service.....	16	10
Subpoena .....	16	10
Marshal's return of service .....	18	12
Writ of injunction .....	19	13
Marshal's return of service .....	20	14
Amended bill .....	20	14
Affidavit of W. B. Childers.....	27	21
Exhibit.—Prospectus of the Rio Grande Irrigation and Land Company, Limited.....	31	25
Plea .....	52	46
Answer .....	56	50
Motion to discharge rule, dissolve injunction, and dismiss bills.....	62	56
Replication .....	63	57
Motion to set pleas for hearing .....	63	57
Affidavit of Anson Mills.....	64	58
Deed between The Rio Grande Dam and Irrigation Company and The Rio Grande Irrigation and Land Company, Limited, May 30, 1896.	69	63
Articles of incorporation of The Rio Grande Dam and Irrigation Company .....	77	71
Acts to authorize the construction and operation of a street railway and wagon bridge across the Rio Grande between El Paso, Tex., and Paso del Norte, Mexico.....	80	74

Transcript from district court—Continued.	Original. Print.
Affidavit of Wilfred T. Johns.....	84 78
Henry S. Gillett.....	86 80
A. K. Watts.....	88 82
Dr. Lewis Kennon.....	89 83
James R. Brent.....	90 84
Richard Hudson.....	90 84
John D. Bail.....	92 86
James T. Reed.....	92 86
Ricard L. Powel.....	94 88
John M. Ginn.....	95 89
Exhibit A.—Letter of Assistant Commissioner of the General Land Office to register and receiver at Las Cruces, N. Mex., November 14, 1891, inclosing copies of selections of lands made by Geological Survey .....	96 90
Exhibit B.—Letter of Secretary Smith to Commissioner of the General Land Office, August 18, 1894.....	103 97
Letter of Secretary Smith to Commissioner of the General Land Office, August 18, 1894.....	104 98
Letter of the Commissioner of the General Land Office to register and receiver at Las Cruces, N. Mex., September 26, 1894 .....	105 99
Letter of Acting Commissioner of the General Land Office to register and receiver at Las Cruces, N. Mex., November 8, 1894 .....	106 100
Register's certificate.....	107 101
Exhibit H 1.—Certified copy of application filed June 18, 1897, by The Rio Grande Dam and Irrigation Company for entry of United States reservoir sites .....	107 101
Exhibit G.—Letter of Col. Anson Mills to the Secretary of State, November 17, 1896.....	110 104
Letter of Secretary of State to Secretary of Interior, November 30, 1896.....	116 110
Exhibit F.—Letter of Secretary of State to Secretary of Interior, January 11, 1897.....	120 114
Order for temporary injunction.....	123 117
Order beginning hearing on motion to dissolve injunction, etc.....	123 117
Order taking motions to continue and to dissolve injunction under advisement .....	124 118
Order dissolving injunction.....	125 119
Order granting leave to file documentary evidence.....	127 121
Final decree .....	128 122
Clerk's certificate .....	130 124
Syllabus of opinion.....	131 125
Opinion of the court .....	132 126
Clerk's certificate .....	148 142
Affidavit of William Kelly.....	150 144
Assignment of errors.....	154 149
Order taking cause under advisement.....	155 149
Final decree .....	155 149
Allowance of appeal.....	156 149
Clerk's certificate.....	157 150
Citation and acceptance of service.....	158 150
Stipulation as to opinion.....	159 151
Clerk's certificate.....	160 151

1 In the supreme court of the Territory of New Mexico. July term, 1897.

Be it remembered that there was filed in the office of the clerk of the supreme court of the Territory of New Mexico, on August 9th, A. D. 1897, a stipulation, which said stipulation is in the words and figures following, to wit:

UNITED STATES OF AMERICA, APPELLANT,  
vs.  
RIO GRANDE DAM AND IRRIGATION Co.  
and the Rio Grande Irrigation & Land  
Co. (Limited), appellees.

*Stipulation.*

It is hereby stipulated and agreed by the appellant, by W. B. Childers, United States attorney for New Mexico, and the appellees, by Albert B. Fall, of their solicitors, that the appeal sued out in the above-entitled cause may be docketed at the present term, July, 1897, of the supreme court of the Territory of New Mexico and set down for hearing by the court at said term and heard as if the said appeal had been

2 granted more than thirty days before the beginning of the said term and had been regularly returnable thereto under the statute.

It is further stipulated and agreed that upon the hearing of said cause the original papers may be forwarded by the clerk of the district court of the third judicial district to the clerk of the supreme court of the Territory and used upon the hearing in said court without the same being printed, provided the court will consent thereto; said papers to be returned to the said district court after copies of the same have been made for the purpose of completing the record in said supreme court.

W. B. CHILDERS,  
*U. S. Atty. & Solicitor for Appellant.*

W. H. POPE.

ALBERT B. FALL,  
*Solicitor for Appellees.*

[Endorsement.]

No. 753.

Supreme court, Territory of N. Mex. July term, 1897.

UNITED STATES  
vs.  
RIO GRANDE DAM & IRRIGATION CO. ET AL.

*Stipulation.*

Filed in my office this 9th day of Aug't, 1897.

GEO. L. WYLLYS, Clerk.

3 And afterward, to wit, at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fe, New Mexico, the seat of government of said Territory, on the last Monday of July, A. D. 1897, the same being Monday, July 26th, 1897, and on the thirteenth day of said term, the same being Monday, August 9th, 1897, the following, among other proceedings, were had, to wit:

4 In the supreme court of the Territory of New Mexico. July term,  
A. D. 1897.

UNITED STATES OF AMERICA, APPELLANTS,  
vs.  
THE RIO GRANDE DAM AND IRRIGATION COMPANY, }  
appellees.

Stipulation having been entered into in this cause by and between the parties thereto by their respective counsel, that the appeal taken in said cause may be docketed and heard at the present term of this court to the same effect as if the same had been sued out more than thirty days prior to the first day of the term, and said stipulation having been submitted to the court.

It is hereby ordered that said cause be docketed and set for hearing on the twentieth day of August, A. D. 1897.

It is further ordered that the filing of the transcript of the record required by the statutes and the rules of the court be dispensed with, and that the clerk of the district court of the third judicial district be, and he is hereby, ordered to certify and return to the clerk of this court all the original papers in said cause now on file in his office with all convenient speed, said papers to be used upon the hearing of said cause in lieu of a certified transcript thereof.

It is further ordered that after the hearing of said cause a copy of said papers and record be prepared and certified and left on file with the clerk of this court as the record in said cause, and that the original papers thereafter be returned to the clerk of the said district court.

It is further ordered that the printing of the record in said cause be dispensed with.

5 [Endorsement.]

No. 753.

Supreme court, Territory of N. M. July term, 1897.

UNITED STATES  
vs.  
RIO GRANDE DAM AND IRRIGATION CO. ET AL. }

Order.

Filed in my office this Aug. 9th, 1897.

GEO. L. WYLLYS.

And afterwards, to wit, on August 17th, 1897, at the said regular term of said supreme court, the following, among other proceedings, were had, to wit :

THE UNITED STATES OF AMERICA, APPELLANT, } No. 753. Appeal  
vs.  
RIO GRANDE DAM AND IRRIGATION COMPANY, ET } from the third  
al., appellees. judicial dis-  
trict court.

On motion of appellant by W. B. Childers, esq., it is ordered that this cause be set for hearing on Monday, August 23rd, 1897.

6 And afterwards, to wit, on August 23rd, 1897, there was filed in the office of the clerk of the said supreme court a transcript, which said transcript is in the words and figures following, to wit:

# IN THE SUPREME COURT OF NEW MEXICO.

---

JULY TERM, A. D. 1897.

---

No. —

---

UNITED STATES OF AMERICA,  
*Appellant,*  
vs.  
THE RIO GRANDE DAM & IRRIGATION CO. ET AL.,  
*Appellees.*

---

United States of America, }  
Territory of New Mexico, }

In the District Court of the Third Judicial District of  
the Territory of New Mexico, for the trial of  
causes arising under the laws of the United  
States.

To the Honorable Gideon D. Bantz, Associate Justice  
of the Supreme Court of the Territory of New  
Mexico, and Judge of the Third Judicial District  
Court thereof:

The United States of America, by Joseph McKenna,  
their attorney general, and William B. Childers, United  
States attorney for the Territory of New Mexico, bring

this, their bill of complaint against The Rio Grande Dam & Irrigation Company, a corporation duly organized under and in pursuance of the laws of the Territory of New Mexico, and having its principal place of business in the town of Las Cruces, County of Doña Ana, in said Territory.

1. And thereupon your orators, complaining, say that the defendant, the said The Rio Grande Dam & Irrigation Company, had and has for the objects and purposes of its incorporation, the construction and maintenance of dams and reservoirs, and canals, ditches and pipe-lines to the extent of from fifty miles to five thousand miles in the Territory of New Mexico; and for the purpose of supplying water to be accumulated in practically illimitable quantity in said dams and reservoirs, canals, ditches and pipe-lines, it was and is the object and purpose of the said defendant company to construct and build dams across the Rio Grande river in the Territory of New Mexico at such certain points in the said river in said Territory, that may be necessary to carry out the objects and purposes of said incorporation.

2. Your orators show that section 10 of the Act of Congress of September 19th, 1890, (26 Stat. 454) is as follows, to-wit:

"That the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect to which the United States has jurisdiction, is hereby prohibited. The continuance of any such obstruction, except bridges, piers, docks and wharves and similar structures, erected for business purposes, whether heretofore or hereafter created, shall constitute an offense and each week's continuance of any such obstruction shall be deemed a separate offense. Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall violate

the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court; the creating or continuing of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney General of the United States."

And that Section 3 of the Act approved July 13, 1892 (27 Stat. 110) is as follows, to-wit:

"That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, break-water, bulkhead, jetty or structure of any kind outside of established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said water; it shall not be lawful hereafter to commence the construction of any bridge, bridge-draw, bridge piers and abutments, cause-way, or other works over or in any port, road, road-stead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any state, until the location and plan of such bridge or other works have been submitted and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of any port, road-stead, haven, harbor, harbor of refuge, or inclosure within the limits of any break-water, or of the channel of any navigable water of the United States, unless approved and authorized by the Secretary of War: *Provided*, That this section shall not apply to any bridge, bridge-draw, bridge piers and abutments, the construction of which has heretofore been duly authorized by law, or be so construed as to

authorize the construction of any bridge, draw-bridge, bridge piers and abutments, or other works under the act of the legislature of any state over or in any stream, port, road-stead, haven or harbor or other navigable water not wholly within the limits of such state."

3. Your orators further show and complain, that the said defendant company are particularly and immediately about to commence and to create, and intend and threaten to commence and create, an unlawful obstruction in the said Rio Grande river by constructing a dam in and across said river at a point called Elephant Butte, in the Territory of New Mexico and in the Third Judicial District thereof, the same being one hundred and twenty-five miles north and slightly west of the city of El Paso, in the state of Texas, for the purpose of storing water in a large quantity to carry out the purposes of said incorporation, as before in this bill mentioned.

4. Your orators further show, that the said Rio Grande river from and including the site of the proposed said dam and construction by the said defendant company, has been used to float logs for commercial and business purposes and for affording a means for commercial traffic within and between the Territory of New Mexico and the State of Texas, in the United States of America, and the Republic of Mexico; that the first material addition to the volume of water of the said Rio Grande river is at a point three hundred and twenty-five miles below the site of the said proposed dam and construction by said defendant company, where the Rio de los Conchos, or Conchos river, empties into said Rio Grande river; and that the said Rio Grande river is a navigable stream and used as such in interstate commerce, from the mouth of said Conchos river, in the Republic of Mexico, to the City of El

Paso, State of Texas, in the United States of America, a distance of two hundred miles.

5. And further, that the navigability of the said Rio Grande river at the City of El Paso aforesaid, has been recognized and acknowledged heretofore by the Congress of the United States and Secretary of War of the United States.

6. And further, that the said Rio Grande river, from the City of El Paso aforesaid up to and beyond the site of the dam proposed and threatened to be commenced and constructed by the said defendant company, as aforesaid, carries a greater quantity of water than it carries at the said City of El Paso, and by reason of the conformation of the bed and banks, and the channel thereof, makes navigation of such last mentioned portion of said river, a feasible accomplishment.

7. And further, that such proposed dam will be such a one as will check the flow of water in the said Rio Grande river at the said point of Elephant Butte entirely for a greater portion, if not the entire year, and impound it; and that such distribution of the waters of said river from within said proposed dam at said Elephant Butte, as contemplated, intended, threatened, and about to be attempted, commenced, begun and created, and constructed by said defendant company, as aforesaid, will practically destroy the said river as a stream for many miles below said point at said Elephant Butte, and the volume of the water below said proposed dam so diminished by the construction and uses thereof as aforesaid, as to materially effect the navigability of said Rio Grande River, and impair navigation and commerce throughout its entire course from said proposed dam at Elephant Butte to the Gulf of Mexico.

8. And further, that the creation of an obstruction to the navigable capacity of said river, by the building of said proposed dam, as above described, by the defendant company, is not affirmatively authorized by law, nor has any such authorization been given.

9. And further, that the proposed building and construction of the said proposed dam by said defendant company is without the permission, authority or approval of the Secretary of War of the United States.

10. Your orators complaining, show further, that the said defendant company, by means in part of said dam, to be constructed as aforesaid, proposes to create the largest artificial lake in the world, to obtain control of the entire flow of the Rio Grande river in the southern part of the Territory of New Mexico, hereinbefore described, the same being the only practical river for irrigating said portion of said territory; by controlling said river, as aforesaid, to control to a great extent the irrigable land adjacent thereto in said district and territory; to subject the owners of irrigable lands therein to a perpetual water rent; to obtain possession, by means of the practically exclusive power of water rights in a partially arid region of the United States, of large tracts of irrigable land in said portion of said territory; to secure a monopoly of all the water suitable for irrigation in said territory contiguous to the said river below the site of said proposed dam.

Your orators therefore pray, that the said defendant may be compelled to answer all and singular, the premises in this bill (but not under oath, the answer under oath being hereby expressly waived, and that the defendant, The Rio Grande Dam & Irrigation Company may be restrained from beginning, commencing and attempting, building, constructing,

creating or maintaining any dam, break-water, weir, structure or obstruction of any character whatsoever across the Rio Grande river in the waters thereof, in the Territory of New Mexico, and especially at Elephant Butte, or at any point thereon in said judicial district, or in any manner, to begin the construction of, or to construct or create any structure, dam, or other obstruction of any character whatsoever, in such manner and to such extent as shall effect the navigable capacity of said Rio Grande river in said Territory of New Mexico. Your orators pray, that your Honor may grant a writ of injunction, issuing out of and under the seal of this Honorable court, perpetually enjoining and restraining the said defendant, The Rio Grande Dam & Irrigation Company, its employes and agents, or any one under its authority, for or by them, from any, or further, creating, constructing or maintaining or beginning the construction of any obstruction to the navigability of the waters of said river by any of the means in this bill and in this section hereinbefore set forth.

And your orators further pray, that a provisional or preliminary injunction be issued, restraining the said defendant, The Rio Grande Dam & Irrigation Company, from the beginning, commencement, attempting, building, creating, obstructing or maintaining any obstruction to the navigability of said waters of and across the said Rio Grande river, and in the said waters thereof, in said Territory, by any of the means heretofore mentioned in this bill, to-wit: by means of a dam, break-water, weir, piles, structure or other obstruction.

And for such other and further relief as the circumstances, nature and equity of the case may require, and to your Honor shall seem meet.

Therefore, that your Honor will grant unto your orators, the writ of subpoena in chancery issuing out of and under the seal of this court, to be directed to the said The Rio Grande Dam & Irrigation Company, commanding it to appear on Monday, the 7th day of June, A. D. 1897, before your Honor, in the court aforesaid, then and there to show cause, if any it have, why a perpetual injunction should not be issued against it in this behalf as prayed for in this bill, and then and there answer the premises and abide the order and decree of the court.

JOSEPH MCKENNA,  
Attorney General of the United States.  
By direction of the Attorney General.

W. B. CHILDERS,  
United States Attorney for New Mexico.  
GEO. P. MONEY,  
Assistant United States Attorney for New Mexico.

Territory of New Mexico, }  
County of Bernalillo.      } ss.

I have read the foregoing petition, by me subscribed, and the facts stated therein are true to the best of my information and belief.

GEO. P. MONEY,  
Assistant United States Attorney for New Mexico.

Subscribed and sworn to before me this the 22nd day of May, A. D. 1897.

[SEAL]

E. L. MEDLER,  
Notary Public.

Upon the filing and reading of the foregoing bill of complaint, in the foregoing cause, it is ordered that a temporary writ of injunction issue against the defendant, The Rio Grande Dam & Irrigation Company, as prayed for in said bill, and it is further ordered that

said defendant show cause, if any it have, before me in chambers, on Monday, the 14th day of June, 1897, why said injunction should not be continued in force until the final hearing of the cause, or should be dissolved.

GIDEON D. BANTZ,  
Judge.

Done in chambers, this the 24th day of May, A. D. 1897.

In the United States District Court of the Third Judicial District of the Territory of New Mexico:

The United States of America,  
No. 140,      vs.  
The Rio Grande Dam & Irrigation Company.      } Chancery.

Upon the filing and reading of the bill of complaint in this cause, it is ordered that a temporary writ of injunction issue against the defendant, The Rio Grande Dam & Irrigation Company, as prayed for in said bill, and it is further ordered that said defendant show cause, if any it have, before me in chambers, on Monday, the 14th day of June, 1897, why said injunction should not be continued in force until the final hearing of this cause, or should be dissolved.

GIDEON D. BANTZ,  
Judge.

Done in chambers this, the 24th day of May, A. D. 1897.

---

United States of America,  
Territory of New Mexico,  
Third Judicial District.      }

I, W. B. Walton, clerk of the District Court of the Third Judicial District of the Territory of New Mexico, do hereby certify that the above and foregoing is a true and correct copy of the order granting a tempor-

ary injunction and ordering the defendant to show cause why it should not be continued in force, made and entered of record in the above entitled cause.

[SEAL]

Witness my hand and the seal of said Third Judicial District Court, at Silver City, New Mexico, this 25th day of May, A. D. 1897.

W. B. WALTON,  
Clerk.

Territory of New Mexico,      {  
County of Doña Ana.      }

Within order to show cause came to hand May 30th, 1897, and was duly executed by me on the 31st day of May, 1897, by delivering a true and correct copy hereof to Phœbus Freudenthal, at his place of business at Las Cruces, in said county and territory, the said Phœbus Freudenthal, being one of the directors of The Rio Grande Dam & Irrigation Company, the within named defendants, and the only officer of said company to be found in Doña Ana county.

E. L. HALL,  
Marshal.  
By E. E. BANNER,  
Deputy.

The United States of America,

To The Rio Grande Dam & Irrigation Company,  
Greeting:

You are hereby commanded: That, laying all other matters and things aside, you do cause an appearance to be entered for you in the United States District Court of the Third Judicial District of the Territory of New Mexico, in chancery sitting, on the first return day occurring not less than twenty

98

days after service hereof, if the defendant served is a resident of said judicial district, or on the first return day occurring not less than thirty days after service hereof, if the defendant served is not a resident of said judicial district, then and there to answer unto a bill filed against you by the United States of America, and that you do answer concerning such things as shall then and there be alleged against you, and observe what the said court shall direct in this behalf, on pain of such process of contempt as said court shall award; the first Monday in each month being a return day, and each defendant being required to enter an appearance in the office of the clerk of said court on or before the return day on which this writ is returnable; otherwise the bill herein may be taken pro confesso.

[ SEAL.]

Witness the Hon. Gideon D. Bantz,  
Associate Justice of the Supreme  
Court of the Territory of New  
Mexico, and presiding judge of  
the Third Judicial District Courts  
thereof, and the seal of said court  
at Silver City, New Mexico, this  
25th day of May, A. D., 1897.

W. B. WALTON,  
Clerk and register.

This is a suit in chancery commenced by complainant against defendant, praying that the said defendant may be restrained from beginning, commencing and attempting, building, constructing, creating or maintaining any dam, break-water, weir, structure or obstruction of any character whatsoever, across the Rio Grande river in the waters thereof, in the Territory of New Mexico, and especially at Elephant Butte or any point thereon, in said judicial district, or in any man-

ner to begin the construction of or to construct or create any structure, dam, or other obstruction of any character whatsoever, in such manner and to such extent as shall affect the navigable capacity of said Rio Grande River in said Territory of New Mexico; complainant also prays for perpetual injunction, enjoining and restraining defendant, its employees and agents or any one under its authority, for or by them, from any or further creating, constructing or maintaining, or beginning the construction of any obstruction to the navigability of the water of said river by any of the means in said bill set forth; complainants also pray for a provisional or temporary injunction restraining defendant from the beginning, commencement, attempting, building, creating or obstructing or maintaining any obstructions to the navigability of said waters of and across the said Rio Grande river, and in the said waters thereof, in said Territory, by any of the means hereinbefore mentioned, for general relief.

[ SEAL.]

W. B. WALTON.

Clerk and register.

Territory of New Mexico, {  
County of Doña Ana. }

Within writ came to hand May 30th, 1897, and was duly executed by me on the 31st day of May, 1897, by delivering a true and correct copy hereof to Phœbus Freudenthal at his place of business at Las Cruces in said county and territory, the said Phœbus Freudenthal being one of the directors of the Rio Grande Dam & Irrigation Company, the within named defendants, and the only officer of said company to be found in Doña Ana county.

E. L. HALL,

Marshal.

By E. E. BANNER.

The United States of America.

To the Rio Grande Dam & Irrigation Company,  
Greeting:

Whereas, the United States of America have filed their certain bill in chancery in the United States District Court of the Third Judicial District of the Territory of New Mexico, against you, the said The Rio Grande Dam & Irrigation Campany, your employes and agent, or any one under your authority, defendants to be relieved touching the matters therein complained of and which said bill is still there pending.

We therefore, in consideration of the premises and of the particular matters in said bill set forth, do strictly enjoin and command you, the said The Rio Grande Dam & Irrigation Company, your employes and agents, or any one under your authority, and each and every one of you, under the penalty of the law thence ensuing, that you and every one of you, do absolutely desist and refrain from beginning, commencing, attempting, building, constructing, creating or maintaing any dam, break-water, weir, structure, or obstruction of any character whatsoever, across the Rio Grande river in the waters thereof, in the Territory of New Mexico, and especially at Elephant Butte or at any point thereon in said judicial district, or in any manner to begin the construction of, or to construct or create any structure, dam, or other obstruction of any character whatsoever, in such manner and to such extent as shall affect the navigable capacity of said Rio

Grande River in said Territory of New Mexico, until the further order of this court.

Witness the Hon. Gedeon D. Bantz,  
Associate Justice of the Supreme  
Court of the Territory of New  
Mexico, and presiding Judge of  
the Third Judicial District Courts  
thereof, and the seal of said court  
at Silver City, New Mexico, this  
25th day of May, A. D. 1897.

W. B. WALTON,  
Clerk and register.

Territory of New Mexico,      }  
County of Doña Ana.            }

Within writ of injunction came to hand May, 30th, 1897, and was duly executed by me on the 31st day of May, 1897, by delivering a true and correct copy hereof to Phoebus Freudenthal at his place of business at Las Cruces, in said county and territory, the said Phoebus Freudenthal being one of the directors of The Rio Grande Dam & Irrigation Co., the within named defendants, and the only officer of said company to be found in Doña Ana county.

E. L. HALL,  
Marshal.

By E. E. BANNER,  
Deputy.

United States of America,      }  
Territory of New Mexico.        }

In the District Court of the Third Judicial District of the Territory of New Mexico, for the trial of causes arising under the laws of the United States.

*To the Honorable Gideon D. Bantz, Associate Justice  
of the Supreme Court of the Territory of New*

*Mexico, and Judge of the Third Judicial District Court thereof:*

1. The United States of America, by Joseph McKenna, their Attorney General, and William B. Childers, United States Attorney for the Territory of New Mexico, bring this their amended bill of complaint, by leave of the court, against the Rio Grande Dam & Irrigation Company, a corporation duly organized under and in pursuance of the laws of the Territory of New Mexico, and having its principal place of business in the town of Las Cruces, county of Doña Ana in said Territory; and the Rio Grande Irrigation and Land Company, Limited, a corporation organized under and by virtue of the laws of Great Britain, having its principal office in the city of London, England, and also being engaged in doing business in the said Territory of New Mexico. Thereupon the complainant alleges and says that the original defendant, the said Rio Grande Dam & Irrigation Company, is incorporated under the laws of the Territory of New Mexico, and has for the object and purposes of its incorporation as such has proposed the construction and maintainance of dams, reservoirs, ditches, canals and pipe lines.

2. The complainant further alleges, as it is informed and believes that the said original defendant intends and gives out, that it will construct from fifty to five thousand miles of canals, ditches, and pipe lines in said Territory of New Mexico, state of Texas, and Republic of Mexico, as set forth in its articles of incorporation, and that in pursuance of the purposes of incorporation it gives out that it is about to construct dams across the Rio Grande in the Territory of New Mexico, at such certain points in said river in said Territory as may be necessary to carry out the said objects and purposes of

this incorporation and proposes to accumulate and impound waters from said river in unlimited quantities in said dams and reservoirs, and distribute the same through said canals, ditches and pipe lines.

3. The complainant further alleges that it is informed and believes that the defendant, the Rio Grande Irrigation and Land Company, Limited, was organized under the laws of Great Britain as an adjunct and agent of the original defendant, the Rio Grande Dam & Irrigation Company, and for the purpose of securing capital for promoting the construction of said dams, reservoirs, canals, ditches and pipe lines, and that the said original defendant, the Rio Grande Dam & Irrigation Company, has entered into a contract or agreement for the conveyance to its co-defendant herein-after designated as the English Company, of some rights in and to said dams, reservoirs, canals, ditches and pipe lines to be constructed as aforesaid, or for the conveyance of their rights in and to said dams, reservoirs, ditches, canals and pipe lines, the exact language and purport and legal effect of which said contracts, agreement or conveyances are unknown to complainant. The complainant further alleges that it is informed that the same is of record in the office of the probate clerk, ex-officio recorder of the county of Sierra and Territory of New Mexico, a copy of which it asks leave to file herewith and make a part of this amended bill, as soon as the same can be procured, to be marked "Exhibit A."

4. The complainant further alleges, upon information and belief, that the said defendant, the Rio Grande Irrigation and Land Company, Limited, as agent, lessee, assignee, or under whatever relation may exist between it and the said original defendant, as

hereinbefore alleged, has attempted to exercise and has claimed the right to exercise all the rights, privileges and franchises of the said original defendant, and has given out as its objects as said agent, lessee, or assignee, as aforesaid, to construct said dams, reservoirs, ditches and pipe lines and take and impound the water of said river, and thereby to create the largest artificial lake in the world and to obtain control of the entire flow of the said Rio Grande and divert and use the same for the purposes of irrigating large bodies of land, and to supply water for cities and towns, and for domestic and municipal purposes, and for milling and mechanical power.

5. The complainant further alleges that the Rio Grande receives no addition to its volume of water between the projected dam and the mouth of the Conchos river, about three hundred miles below, and that the said Rio Grande, from the point of said projected dam to the mouth of the Conchos river, throughout almost its entire course from the latter part to its mouth, flows through an exceedingly porous soil and that the atmosphere of the section of the country through which said river flows, from the point above the dam to the Gulf of Mexico, is so dry that the evaporation proceeds with great rapidity and that the impounding of the waters will greatly increase the evaporation, and that from these causes but little water, after it is distributed over the surface of the earth, would be returned to the river.

6. The complainant further alleges that said river is navigable and has been navigated by steamboats up to the town of Roma, in the state of Texas, about three hundred and fifty miles from its mouth, and is susceptible of navigation and has been navigated above Roma to a point about one hundred and fifty miles below El

Paso, in the state of Texas. The complainant further alleges that the navigability of said river is interfered with at the last mentioned point by some falls or rapids, and that the said river above said falls or rapids is susceptible of navigation up to La Joya in the Territory of New Mexico, about one hundred miles above Elephant Butte, where defendants propose to construct said dam; and said complainant further alleges that the said river between said rapids and said town of La Joya, has at different times been used for the purposes of floating and transporting rafts, logs and poles, and that the said portion of said stream is susceptible of being used and navigated for commercial purposes. And the complainant further alleges that the said river is navigable and susceptible of being navigated as aforesaid, for carrying on commerce between the Territory of New Mexico, the state of Texas, and the Republic of Mexico.

7. The complainant further alleges that the impounding of the waters of said river by the construction of said dam and reservoir at said point, called Elephant Butte, about one hundred and twenty-five miles above the City of El Paso, said point being in the Territory of New Mexico, and the diversion of the said waters and the use of the same for the purposes hereinbefore mentioned, will so deplete and prevent the flow of the water through the channel of said river below said dam, when so constructed, as to seriously obstruct the navigable capacity of the said river throughout its entire course from said point at Elephant Butte to its mouth.

8. Complainant further alleges that the construction of said dam has never been affirmatively authorized by law, and the plans and specifications for the construc-

tion of the same have not been submitted to the Secretary of War for his approval, and the location and plans have not been submitted and approved by him; and the complainant further alleges that no dam, or other obstruction to the navigable capacity of any waters can be lawfully constructed, until the same have first been affirmatively authorized by law, and until the location and plans for such obstruction, have been submitted and approved by the Secretary of War.

9. The complainant further alleges that the navigability of the said Rio Grande at the City of El Paso, state of Texas, has been recognized and acknowledged by the Congress of the United States and the Secretary of War of the United States.

The complainant further alleges that by the treaty, the Government of the United States of America and the Republic of Mexico, have, by treaty stipulation, agreed and declared that the Rio Grande from the southern boundary of the Territory of New Mexico to its mouth, shall be free and common to the vessels and citizens of both countries, and that neither country shall without the consent of the other, construct any work that may impede or interrupt, in whole, or in part, the exercise of said right of free navigation, and that neither party of said treaty have consented or authorized the construction of said dam.

Complainant files herewith the articles of incorporation of said original defendant as a part of this bill of complaints, marked "Exhibit B."

Wherefore the complainant being remedyless except in a court of equity, where such matters are remedial, the complainant prays that a subpoena in chancery be directed to said defendants, the Rio Grande Dam & Irrigation Company and the Rio Grande Irrigation and

Land Company, Limited, requiring them to be and appear before this Honorable court at a time and place to be therein named, to answer all and singular the premises but not under oath (answers under oath being hereby expressly waived), and that the said defendants, the Rio Grande Dam & Irrigation Company and the Rio Grande Irrigation and Land Company, Limited, may be restrained from beginning and commencing or attempting to construct or build said dam and reservoir or any other dam, breakwater, reservoir or other structure or obstruction of any character whatsoever across the Rio Grande or the waters thereof, or from maintaining such dam or obstruction in the Territory of New Mexico, and especially at Elephant Butte, in said Territory, or any other point on said river in said Territory of New Mexico, as shall effect the navigable capacity of said Rio Grande at any point throughout its course, whether in the Territory of New Mexico or elsewhere. And that the temporary injunction heretofore granted against said original defendant be continued.

And the complainant prays that it shall have such other and further relief in the premises as equity may require and to your Honor shall seem meet.

The complainant further prays that a temporary injunction be issued and directed to the said defendants, The Rio Grande Dam & Irrigation Company and the Rio Grande Irrigation and Land Company, Limited, restraining and enjoining them and each of them from beginning, commencing and attempting to construct or build said dam and reservoir or any other dam, breakwater, reservoir or other structure or obstruction of any character whatsoever across the Rio Grande or the waters thereof, or from maintaining such dam or ob-

struction in the Territory of New Mexico, and especially at Elephant Butte, in said Territory, or any other point on the line of said river in said Territory of New Mexico, as shall effect the navigable capacity of said Rio Grande, at the further orders of this Honorable court, and that upon the final hearing of this cause that said injunction shall be perpetual.

JOSEPH MCKENNA,

Attorney general of the United States.

W. B. CHILDERS,

United States attorney for the Territory of New Mexico.

In the District Court of the Third Judicial District of  
The Territory of New Mexico.

United States of America,  
Complainant.  
No. — vs.  
The Rio Grande Dam & Irrigation Company, et al.  
Defendants.

Affidavit of W. B. Childers, United States Attorney.  
Territory of New Mexico, } ss.  
County of Bernalillo. }  
Defendants.

William B. Childers, of lawful age, being duly sworn, upon oath, deposes and says: That he is United States Attorney for the Territory of New Mexico; that under instructions from the Attorney General of the United States, he communicated by letter with the defendant, The Rio Grande Dam & Irrigation Company, at Las Cruces, New Mexico, stating to them that he, affiant, had been instructed to prevent said company from erecting a dam across the Rio Grande, at a place called Elephant Butte, in the Territory of New Mexico, about one hundred and twenty-five miles above El Paso, and that it had been reported that said company was about to commence work, and requested an answer to his com-

munication. A few days afterwards the defendant company wired affiant, that it did propose to commence the erection of said dam at said point. Thereupon, affiant instructed George P. Money, Assistant United States Attorney, to file suit to enjoin the construction of said dam and reservoir; whereupon the original bill in this cause was filed. Affiant further says, that he is officially informed, and believes that the erection of said dam and reservoir has not been authorized by the Secretary of War, and that the same is not affirmatively authorized by law.

Affiant further states, that from his knowledge of geography and information acquired from books of reference and official reports made by officials of the Government of the United States, that the said Rio Grande is a navigable stream for a considerable distance above its mouth, and therefore states positively that such is the fact.

Affiant further states, that from documentary evidence on file in the department of state at Washington, copies of which have been furnished him, that the said river is susceptible of navigation and has been navigated to a point about one hundred and fifty miles below El Paso, in the state of Texas, as alleged in the amended bill of complaint filed in this cause. Affiant further states, that he has been reliably informed and believes that said river has been used above said point in the past for the purpose of floating logs down the stream to the city of El Paso, and that he is also informed and believes that said river has been recently so used for floating telegraph poles for a short distance a little below the town of La Joya, which is situated on said river in the county of Socorro, New Mexico.

Affiant further states, that from an examination of

the reports of W. W. Follett, engineer of the International Water Boundary Commission, organized pursuant to treaty between the government of the United States and the Republic of Mexico, that the amount of water in said river has been greatly depleted and diminished within the past ten or twelve years by reason of the diversion for the purpose of irrigation by ditches and otherwise of large amounts of water in Colorado and New Mexico above the point where the said defendant company proposes to construct the said dam; that said depletion and diminution has seriously effected the navigable capacity of the said river at said point called Elephant Butte and below there.

Affiant further states, that upon the hearing on the rule to show cause why the temporary injunction issued in this cause should not be continued, he will present in support of this affidavit, the original, or copies properly certified, of the documents above referred to, together with others to sustain the allegations made upon information and belief in this case.

Affiant further says, that from an examination of the certified copies of the articles of incorporation of said Rio Grande Dam & Irrigation Company, which said certified copy he proposes to present upon said hearing, he is informed and believes that the purposes of the said defendant company, are to construct said dam and a line of ditches and canals and pipe lines, to begin at the dam or dams to be built by said company across the Rio Grande river at a place, or various and several places, within township thirteen (13) and fourteen (14) and ranges three (3) and four (4) west, in Sierra county, New Mexico, and to terminate at any point or place and various and several places, in the Territory of New Mexico, state of Texas, and Republic of Mexico, to

which it may be practicable to carry the waters so accumulated, and that the length of said canals and ditches to be from fifty miles to five thousand miles.

Affiant further states, that the Rio Grande Irrigation and Land Company, Limited, made a co-defendant by the amended bill filed in this case, as he is informed and believes, has the contract-relation set up and alleged in the amended bill filed in this case with the said original defendant, The Rio Grande Dam & Irrigation Company, and was organized for the purpose of constructing or promoting the construction of said improvements above described, either by actually constructing the same or by raising the necessary capital therefor; and that said company, according to the prospectus issued by it, was formed to acquire by lease and assignment, the franchises, rights, water rights, and rights to appropriate the waters of the Rio Grande, contracts, purposes and undertakings of the said defendant, The Rio Grande Dam & Irrigation Company, and for the purpose of irrigating, colonizing and improving the lands in the Rio Grande Valley between Engle, New Mexico, and Fort Quitman, Texas, and affiant files herewith and makes a part of this affidavit a copy of the prospectus issued by said defendant, the Rio Grande Irrigation and Land Company, Limited.

Affiant further states, that by the terms of an Act of Congress passed on the 6th day of September, A. D. 1888, and of an Act of Congress approved July 28th, 1882, the Rio Grande was treated and recognized as a navigable stream at the city of El Paso in the state of Texas, and that the Secretary of War has recognized it as a navigable stream, and so treats it, and has requested the Department of Justice to take such proceedings as

may be necessary to prevent the construction of said dam and reservoir.

**WILLIAM B. CHILDERS.**

Subscribed and sworn to before me this the 19th day of June, A. D. 1897.

**E. L. MEDLER,**

[SEAL]      Notary Public, Bernalillo County,  
New Mexico.

*Private and Confidential.*

Sufficient of this issue having been guaranteed, the directors will proceed to allotment on or before the        day of April, 1896.

**RIO GRANDE IRRIGATION AND LAND  
COMPANY, LIMITED.**

Incorporated under the Companies Acts, 1862 to 1893, by which the liability of the Shareholders is limited.

**CAPITAL - - - - £500,000.**

In 100,000 8 per cent. Cumulative Preference Shares of £1 each, and 400,000 Ordinary Shares of £1 each.

Issue of £100,000 in 8 per cent. Cumulative Preference Shares of £1 each, and £100,000 in Ordinary Shares of £1 each.

Payable 2s. 6d. on Application; 7s. 6d. on Allotment; and the balance as required.

The Preference Share issue is preferential both as to Capital and Dividend, and after 8 per cent. has been paid on the Ordinary Shares, ranks *pari passu* Share for Share with the Ordinary Shares in the surplus annual profits.

**Issue of 1,000 First Mortgage Debentures of £50 each,  
(Part of Authorized Issue of £100,000.)**

Bearing Interest at Five (5) per cent. per annum, payable Half-yearly on the 1st day of January and the 1st day of July in each year. Redeemable at £55 on the 1st of January, 1916, or previously on six months' notice.

The Debentures are offered at £52 10s. per £50 Debenture Bond, payable as follows:—

£5 on Application.	£10 3 months after allotment.
5 on Allotment.	
7-10-0 1 month after allotment.	25 6 months after allotment.
<hr/>	
<u>£52-10-0</u>	

The Debentures will be secured by a Trust Deed creating a First Mortgage in favour of the Trustee for the Debenture Holders on—First: Certain exclusive privileges and franchises, granted by the Government of the United States of America, for the creation of Dams, Weirs, Ditch Heads, Canals, and other works in connection with Irrigation and Right of Appropriating the Waters of the Rio Grande. Second: The Dams, Weirs, Ditch Heads, Canals and Reservoirs and other Irrigation Works to be constructed. In addition thereto, Debenture Holders will further be secured by a Floating Charge created by the said Trust Deed on all the other assets of the Company, both present and future, including; (a) the Lands which shall hereafter be acquired in exchange for Water Rights, the Plant and Contracts, and the unsold Water Rights for the time being; (b) The Income derived from Water Rents and other sources.

In the Trust Deed, provision will be made for a

sinking fund sufficient to redeem the Debentures at maturity, or whenever prior thereto they may be paid off as provided in the said Trust Deed; and a sum adequate for the payment of interest for two years from January 1st, 1896, a period deemed fully ample for construction, *will be invested in Consols by the Vendor Company*, in the name of the Trustee for the Debenture Holders.

TRUSTEE FOR THE DEBENTURE HOLDERS.

THE NATIONAL SAFE DEPOSIT COMPANY,  
LIMITED,

MARQUIS OF TWEEDDALE, (*Chairman.*)

1, Queen Victoria Street, Mansion House, London,  
E. C.

DIRECTORS.

The Right Hon. The Earl of Winchilsea and Nottingham, Haverholme Priory, Sleaford.

The Right Hon. Lord Clanmorris, Bangor Castle, Belfast.

Lord Ernest W. Hamilton, Coates Castle, Pulborough, Sussex.

Robert J. Price, M. P., 104, Sloane Street, S. W.

Colonel W. J. Engledue, Petersham Place, Byfleet, (late R. E. & late an Engineer-in-Chief & Manager Indian State Rys.)

John Ferguson, 14, St. George's Square, S. W. (Ramage & Ferguson, Ltd.) Shipowner & Shipbuilder, Leith.

\*Nathan E. Boyd, Kilmarnock House, Kenley, Surrey (President, Mesilla Valley Irrigation Colony, New Mexico.)

\*R. Chetham-Strode, Fairholme, Pinner, Middlesex.

\*Shareholders in and representing the Vendor Company.

## LOCAL DIRECTORS.

The Hon. W. T. Thornton (Governor of New Mexico).

Edwin C. Roberts (Director, the Rio Grande Dam & Irrigation Company, U. S. A.)

Joshua S. Reynolds (President, First National Bank, El Paso, Texas.)

John M. Yair (Director, Mesilla Valley Fruit and Vine Growing Company, Limited).

Henry D. Bowman (Bowman & Sons, Bankers, Las Cruces, N. M.).

## BANKERS.

The Royal Bank of Scotland, St. Andrew Square, Edinburgh; 123, Bishopsgate Street Within, London, E. C.; and branches. (*For the Company.*)

Messrs. Brown, Janson & Co., 32, Abchurch Lane, London, E. C. (*For the Trustee.*)

## LOCAL BANKERS.

First National Bank, El Paso, Texas.

Bowman & Sons, Las Cruces, New Mexico.

## BROKERS.

Messrs. R. B. Smith & Co., 10, Throgmorton Avenue, and Stock Exchange, London, E. C.

Mr. J. Souter Sanderson, 10a, North. St. David Street, and Stock Exchange, Edinburgh.

Mr. Douglas Cairney, 45, West Nile Street, and Stock Exchange, Glasgow.

Messrs. Marsland & Chew, 4, St. Ann's Square, and Stock Exchange, Manchester.

Messrs. Godfrey & Laws, 12, Mount Stuart Square, Cardiff.

## AUDITORS.

Messrs. Ford, Rhodes & Ford, 81, Cannon Street,  
London, E. C.

## ENGINEER.

John L. Campbell, C. E.

SOLICITORS (*to the Company.*)

Messrs. Nicholson, Graham & Graham, 24, Cole-  
man Street, London, E. C.

Messrs. Davis, Beall & Kemp, El Paso, Texas, U.  
S. A.

SOLICITORS (*to the Vendor Company.*)

Messrs. Minet, Pering, Smith & Co., 81, Cannon  
Street, London, E. C.

SOLICITORS (*to the Trustee.*)

Messrs. Ashurst, Morris, Crisp & Co., 17, Throg-  
morton Avenue, London, E. C.

## REGISTERED OFFICE OF THE COMPANY.

34, Victoria Street, Westminster.

SECRETARY (*pro tem.*)

N. P. Allison.

25-3-96.

## PROSPECTUS.

This Company has been formed to acquire, by lease  
and assignment, the Franchise Rights, Water Rights,  
Right of Appropriating the Waters of the Rio Grande  
(U. S. A.), Contracts, Properties, and Undertaking of  
the Rio Grande Dam & Irrigation Company, and for  
the purposes of irrigating, colonizing, and improving  
the lands in the famous Rio Grande Valley, between  
Engle, New Mexico, and Fort Quitman, Texas.

The Vendor Company was incorporated in 1893, under the Laws of New Mexico, U. S. A., to construct irrigation works, and consolidate, under one Corporate Body, certain irrigation rights and interests, in the Rio Grande Valley, in Southern New Mexico and El Paso County, Texas.

In the Rio Grande Valley the inexhaustible fertility of the soil, the capabilities for irrigating with the fertilising waters of the Rio Grande—the Nile of America—combined with the exceptionally fine climate, so peculiarly adapted to fruit and vine culture, and the superior railway facilities (five important railways centre in this valley at El Paso), present unequalled advantages for profitable fruit farming and vine growing.

Fruit Farmers and Vine Growers in the Rio Grande Valley are about 1,200 miles nearer than the California Growers to Chicago and the Eastern Markets, and fruit grown in the Rio Grande Valley matures several weeks earlier.

The soil is alluvial, and analysis shows it to be admirably suited to the production of all kinds of fruits, cereals, and vegetables. Under irrigation phenomenal crops are obtained, the rich chocolate loam affording a yield remarkable both for quantity and quality.

The Rio Grande Valley has been pronounced by French experts to have few rivals as a fruit, raisin, and wine-producing country, and is now recognized by eminent European and American medical authorities as a most favoured sanitarium for those suffering from pulmonary and throat troubles. "Almost perpetual sunshine, cool summers, warm winters—average 63 degrees—considerable elevation—altitude

from 3,500 to 4,000 feet—and a dry aseptic atmosphere."

The completion of the Company's system of canals will bring 230,000 acres of valley lands under ditch, and by the construction of the high level canal, about 300,000 acres of magnificent mesa (low lying table lands) can be irrigated (*vide* Engineer's Report).

*The amount of fertile alluvial lands capable of being irrigated by the Company's canals, when completed, is only limited by the flow of the Rio Grande, which is one of the largest of the American rivers.* Though the greatest flow of the river occurs during the months of April, May, June and July, just when the orchards and vineyards most require irrigation, the storage of water is necessitated because the minimum flow of the river generally occurs about the end of the cropping season, when some irrigation is still requisite, and because an adequate supply of water must also be insured for irrigation in the early spring, when the river is low.

The Vendor Company has secured, under United States Federal Law, the only feasible reservoir site on the Rio Grande, in Southern New Mexico, and the completion of the storage dam at Elephant Butte, *will create the largest artificial lake in the world*, (11,036,722,000 cubic feet) at a cost of 4s. 9d. per acre foot (capacity), as compared with the cost of the Sweetwater dam (California) £8 10s. 5d. per acre foot, the Merced Valley Dam (California) £5 10s. 10d., Castlewood Dam (Colorado) £7 10s. 4d. per acre foot. *Vide* the Engineer's Report.

In acquiring this splendid natural reservoir site the Company will obtain control of the entire flow of the Rio Grande in Southern New Mexico; the only prac-

tical means of irrigating what is now considered to be the finest fruit and vine country in the United States.

*In controlling the water the Company will, to a great extent, control the irrigable lands.*

Many of the owners of irrigable lands in the Valley have already contracted to convey to the Vendor Company, *one-half of their lands* in return for Water Rights to the other half, and to pay a Water Rent of \$1.50, (6s.) per acre per annum for every acre of their land irrigated. A Water Right is the perpetual right to the use of water for irrigation purposes, at a fixed annual rental per acre irrigated, and is inalienable from the land to which the Water Right pertains.

*Obviously the remaining landowners must, in order to render their properties of value, concede a large portion of their lands for Water Rights, or purchase the said Water Rights at the ruling rate, from the Company.*

By exchanging Water Rights for lands it is estimated that the Company will obtain in fee simple within two years not less than 40,000 acres of irrigable valley lands; and by constructing the proposed high level canal quite two-thirds of the vast mesa lands can be secured by the Company from the Government, and Ranch Owners, upon even more advantageous terms.

The mesa lands, like the valley lands, are alluvial deposits, level, clear, and ready for the plough, equally as suitable for Fruit and Vine Culture as the Valley, but on a higher level than the valley lands proper.

The 40,000 acres of Valley Land, if sold, with Water Rights, as low as £10 per acre, will return the Company £400,000. California Irrigable lands sell for £20, £50 and £100 per acre; and the Mesilla Valley

Irrigation Colony, located on the Rio Grande in the Mesilla Valley, a sub-division of the Rio Grande valley to be irrigated from the Company's Canals, is rapidly selling its lands at £20 per acre and upwards.

The revenue of the Company will be derived principally from the sale of Lands and Water Rights, from Water Rents; from the supplying of water to cities and towns for domestic and municipal purposes; and for milling and mechanical power, for which there is a large and constantly increasing demand.

Within the district to be irrigated from the Company's Canals, and covered by the Vendor Company's Franchise, over 48,000 acres of valley lands have already been brought under ditch. At \$1.50 (6s.) per acre per annum (the minimum rate) these lands alone will give an income of £15,000 per annum.

After the completion of the Dam, Weirs, and Main Canal, the Company does not intend selling Water Rights under £10 per acre, and Water Rents, under Water Rights, sold after the 1st day of January, 1897, will, in all probability, be raised to not less than 10s. per acre per annum. Under the Sweetwater Irrigation System (California), the annual Water Rent is \$3.50 (14s.) per acre, and lands *with* Water Rights are sold for £40 per acre more than lands *without* Water Rights. (*Vide* Californian State Engineer's Official Report.)

When the whole of the proposed irrigation works are carried out, over 230,000 acres of valley lands, and about 300,000 acres of mesa lands will be under ditch. Say 50,000 acres pay an annual Water Rent of \$1.50 (6s.) per acre, and the remainder, \$2.50 (10s.) per acre, and allowing that two-thirds *only* of the above acreage be irrigated in any one year, the Company will

derive an annual income from Water *Rents* alone of £175,000.

An average of £10 per acre for Water *Rights* will give the Company from the sale of Water Rights to, say, 300,000 acres—£3,000,000. The net return per acre will in all probability be much higher, as many landowners are at present unable to pay cash, and are giving one-half their lands for Water Rights to the other half. These lands should be readily saleable at from £20 to £50 per acre as soon as under ditch.

The whole of the Irrigation Works of the Company are, by Law, *exempt from taxation for six years*.

The property and enterprise, and the cost of building the Canals, and a solid Masonry (Stone and Concrete) Dam, have been exhaustively investigated and reported upon by the Company's Engineer, a thoroughly competent authority in irrigation and hydraulic matters.

The Engineer's estimates for construction (allowing for contingencies, see report) are as follows:—Main Dam at Elephant Butte, £52,398 19s. 2d.; Dam No. 2 (weir, ditch head), £5,807 1s. 8d.; Dam No. 4 (ditch head), £4,095 6s. 3d.; Distributary Canals for Irrigation from Main Dam to lower end of Mesilla Valley (see map) £73,605 4s. 2d.

Tenders have been received by the Vendor Company from reliable and well-known contractors, which show that the main portion of the works (the portion tendered for) can be executed, according to specification, at a price well within the Engineer's estimate.

The statements herein are based upon reports made by Colonel Anson Mills, United States Army (who was specially deputed by the United States Government to study the project of damming the Rio Grande) Major J. W. Powell, late Director of the United States (Gov-

ernment) Geological Survey; John F. Wielandy (late Secretary Missouri State Board of Agriculture); Professor Hiram Hadley, A. M., President of the (Government) College of Agriculture, Las Cruces, Rio Grande Valley, New Mexico; John L. Campbell, C. E., E. V. Berrien, Esq., and others.

The price to be paid to the Vendor Company for its Franchise, Property, Rights, Privileges, Land and Water Contracts, &c., has been fixed at £326,500, payable, £26,-500 in Cash, and £300,000 in fully-paid up Ordinary Shares (out of which the Vendor invests £5,000 in Consols, for payment of interests on Debentures during construction). The Vendor Company will also be paid the premiums received on the present issue of Debentures. The Vendor Company will pay all the expenses of the formation and promotion of the Company up to the first general allotment, and reserves the right to subscribe for any portion of the Share Capital for the time being not subscribed at a premium of  $\frac{1}{8}$ th per Share.

The only contract to which the Company is a party is between the Vendor Company of the one part, and the Company of the other part, and dated the 12th day of February, 1896, relative to the acquirement of the Vendor Company's Rights and Undertaking. The Vendor Company has entered into contracts and arrangements, to which the Company is not a party, in respect of the formation of the Company and the guaranteeing of a portion of its Capital, which may be contracts within the meaning of Section 38 of the Companies Act, 1867, and applications for Shares will be received only on the understanding that the applicants waive the specification of the dates of, and the names of the parties to, such contracts and arrangements, and waive any

further compliance with the said section other than herein contained.

Applications for Debentures and Shares must be made on the accompanying forms, and lodged with the amount payable on application with the Company's Bankers.

If no allotment is made the deposit will be returned in full, and should the number of Debentures or Shares allotted be less than the number applied for, the surplus will be credited in reduction of the amount payable on allotment.

The Debentures may (with interest to date) be exchanged at any time at £55 each, for lands with Water Rights (if any remain unsold) belonging to the Company, at the price at which its lands with Water Rights are then offered for sale.

The Memorandum and Articles of Association of the Company, the Contract above referred to, and a copy of the Debenture Form and Trust Deed, &c., may be seen on application to the Solicitors of the Company, 24, Coleman Street, E. C., and the Reports, Maps, Plans, &c., may be seen on application at the Office of the Company, 34, Victoria Street, Westminster, S. W.

#### **Memorandum of Association of the Rio Grande Irrigation and Land Company, Limited.**

1. The name of the company is "The Rio Grande Irrigation and Land Company, Limited."
2. The registered office of the company will be situate in England.
3. The objects for which the company is established are:
  - (i.) To purchase, lease, obtain concessions of, or otherwise acquire lands and hereditaments of any tenure, or to obtain any interest in any lands or hereditaments in the Territory (or State) of New Mexico,

United States of America, or elsewhere; and to work, manage, and develop the same in such manner as the company shall think fit, and in particular to build dams, weirs, canals, sluices, acequias, ditches, culverts, filter beds, pipes, aqueducts, and other irrigation works, either for irrigation or other purposes, and to execute and do all other works necessary or convenient for obtaining, storing, impounding, selling, delivering, distributing and measuring water for irrigating the lands of the Company, or for the sale and distribution of water to owners or occupiers of lands not belonging to the Company, and for the sale of water rights, and for carrying on the business of an Irrigation and Waterworks Company in all its branches. To erect, improve and maintain piers, warehouses, factories, foundries, wharves, dwelling-houses, and such other premises, buildings, mills, machinery and plant, and to construct such roads, railways, tramways, waterworks, reservoirs, telegraph, water, gas, electric, and power supply works, shops, stores, drainage, sanitary, and other works and conveniences as may seem calculated, directly or indirectly, to advance the Company's interests.

(ii) To supply water to cities and towns, and others for irrigation, domestic and municipal purposes, and for milling and mechanical power. To irrigate, colonize, cultivate, improve, develop, and otherwise turn to account, the resources of any lands, estates, or other properties, that may be acquired by the Company, and for such purpose to purchase such horses, mules, cattle, stock, and implements, as may be necessary for cultivating, clearing, planting, farming, and pasturing the lands of the Company, and from time to time to sell all or any part of the live or dead stock, and the produce of the said lands. To carry on the business of

general merchants, manufacturers, planters, farmers, and cultivators of the soil in all its branches. To grow trees and vines, and deal in agricultural produce and timber. To grow, purchase, or sell grapes, oranges, lemons, and other fruits, and to manufacture, purchase, or sell wines, spirits, barrels, casks, jars, bottles, and other vessels. To erect and carry on fruit and vegetable canning, drying and evaporating works in all their branches. Also to carry on the business of breeding, importing, and exporting sheep, cattle and horses, or any other business, trade or undertaking, the carrying on of which may be deemed by the Company conducive to the development of its property, or interest therein. To do all acts conducive to promote the colonization and settlement of the lands of the Company, and in particular by the establishment of towns, villages and settlements, and the erection of schools, churches, hotels, and such other institutions as may be calculated directly or indirectly to improve or advance the prosperity of the settlers on the lands of the Company.

(iii) To advance and lend money to settlers, colonists, and others, with or without security, and generally to transact all kinds of banking and general agency business in respect of agricultural, commercial, mining, or financial matters, and to guarantee the performance of contracts by customers of, and persons having dealings, with the company.

(iv.) To amalgamate, unite, or co-operate with any other company or association now or hereafter to be established for or engaged in or having objects or undertakings similar or analogous to those of this Company. To make or carry into effect working or other agreements with any other company, authority,

firm, or individuals, for sharing in profits, for their co-operation in or for the establishment and for the attainment of any of the objects herein, and also to acquire or participate in, by taking shares or otherwise, the good-will, property, and assets of any company established for any of the purposes herein mentioned, also to promote or establish any Company for the purpose of acquiring the whole or any part of the property of this Company, or for carrying on its business.

(v.) To purchase for investment or resale and generally to traffic in land and house and other property of any tenure, and any interest therein, and to create, sell, and deal in freehold and leasehold ground-rents, and to make advances upon the security of land, fruit-farms, and vineyards, or house or other property, or any interest therein, and generally to deal in, and traffic, by way of sale, lease, exchange or otherwise, with land and house property, and any other property, whether real or personal.

(vi.) To buy, sell, import, export, manipulate, prepare for market, and deal in merchandise of all kinds, and generally to carry on business as merchants, importers, and exporters.

(vii.) To borrow, raise or secure the payment of money in such manner and on such terms as may seem expedient, and in particular by debentures, debenture stock, or mortgages, whether perpetual or redeemable, at a premium or otherwise, and charged or not charged upon the whole or any part of the property of the Company, both present and future, including its uncalled capital.

(viii.) To draw, accept, endorse, and make, discount, execute, use and issue, promissory notes, bills of exchange, bills of lading, warrants, debentures, deben-

ture bonds, and other negotiable or transferable instruments.

(ix.) To apply to the Government or Legislature of the Territory (or State) of New Mexico, State of Texas, *Mexican State of Chihuahua*, or to the Federal Authorities of the United States of America, or Republic of Mexico, or to any other authority, for any Charters, grants, concessions, irrigating, mining or other privileges or authorities for the better enabling the Company to carry out the objects of the Company.

(x.) To enter into any arrangements with any government or authorities, whether supreme, municipal, local, or otherwise, that may seem conducive to the business or objects of the Company, and to carry out and comply with any such arrangements.

(xi.) To sell, lease, exchange, or otherwise deal with or dispose of the whole or any part of the undertaking, rights, or privileges or the lands and hereditaments, plant, machinery, and buildings of the Company, or any interest therein, for such consideration as the Company may think fit, and, in particular, for shares, debentures, or securities of any other Company, having objects altogether or in part similar to those of this Company, or carrying on any business which this Company is authorized to carry on.

(xii.) To distribute among its members in kind or in specie any property of the Company, or any proceeds of sale or disposal of any property of the Company, but so that no distribution, amounting to a reduction of capital, be made, except with the sanction (if any) for the time being required by law.

(xiii.) To tender for, purchase, or acquire from liquidators, trustees, or other persons, the assets or estates of any insolvent or other corporations, companies,

associations, firms, or persons, and for the purposes of giving effect to and realizing the benefit of any such acquisition, to carry on and conduct any business comprised in any such estate or assets, whether such business is or is not expressly included among the objects of the Company as defined by this Memorandum of Association.

(xiv.) To remunerate by way of allowance of brokerage or commission, or in any other manner, any person or persons for services rendered, or to be rendered, or for assisting to place any shares of the Company's capital, or any debentures, debenture stock, or other securities of the Company, including all commissions or other remuneration to brokers and other persons, for procuring or obtaining settlements and quotations upon London or Provincial, or Foreign Exchanges, of the said share or debenture capital, or of the share or debenture capital of any business undertaken by the Company, and to make donations to such persons, either of cash or other assets, as the Directors of the Company may determine to be directly or indirectly conducive to any of the objects of the Company, or otherwise expedient.

(xv.) To obtain any provisional order, license, authorization, or Act of Parliament, or other legislative authority, for enabling the Company to carry any of its objects into effect, or for effecting any modification of the Company's constitution, and to oppose any applications to Parliament or any other Legislative Authorities which may seem calculated directly or indirectly to be prejudicial to the interest of the Company.

(xvi.) To make all deposits of money or securities and do all things necessary for the compliance with the laws and regulations of any Government in any

place where the business of the Company may for the time being be carried on, and for such purpose, if necessary, to conduct its business through any subsidiary Company, and to do all acts necessary to procure the Company to be duly constituted according to the laws of any State or Territory in the United States of America, or Republic of Mexico.

(xvii.) To invest and deal with the moneys of the Company upon such security and in such manner as the Directors of the Company may from time to time think fit.

(xviii.) To issue any shares of the Company at such times, and in such manner, and either at par or at a premium, or as fully, or in part paid up, and generally upon such terms and conditions in every respect as the Board of the Company shall deem expedient.

(xix.) To support or subscribe to any charitable or public body or works, and to give pensions, gratuities, donations, and emoluments to any persons employed by or rendering service to the Company.

(xx.) To exercise the powers given by the Companies Seals' Act, 1864, in any case in which the Company, or the Board thereof, shall deem it necessary so to do, for the purpose of more properly or effectually carrying on the business of the Company.

(xxi.) To do all or any of the above things either as principals, agents, contractors, trustees, or otherwise, and by or through trustees, agents or otherwise, and either alone or in conjunction with others.

(xxii.) To alter this Memorandum of Association in such particular as may be deemed to be desirable, and to make by-laws, rules and regulations for the management of the Company or otherwise.

(xxiii.) To do all such other things as may be inci-

dental or conducive to the attainment of all or any of the above objects.

4. The liability of the members is limited.

5. The capital of the Company is £500,000, divided into 100,000 cumulative preference shares of £1 each, to be numbered 8 to 100,007 inclusive, and 400,000 ordinary shares of £1 each with power to increase. Any shares of the original capital and any new shares from time to time to be created, may (but subject always and without prejudice to the rights of the holders of the original preference shares) from time to time be issued with any such guarantee or any such right of preference, whether in respect of dividend or repayment of capital, or both or any such other special privilege or advantage over any shares previously issued, or then about to be issued, or at such a premium, or with such deferred rights as compared with any shares previously issued, or then about to be issued, or subject to any such conditions or provisions, as the Company may from time to time by special resolution determine. But no such issue shall be made without the consent in writing of the holders, for the time being, of at least three-fourths of any previous issue of shares which will be thereby affected.

6. Before payment of any dividend on, or making any distribution of profits in respect of the ordinary shares, there shall be set aside out of the net profits of the company such sum or sums as the directors from time to time in their absolute discretion think proper, as a reserve fund to meet contingencies, or for equalizing dividends, or for providing for the redemption of the debentures of the company (if any), or for repairing or maintaining any property of the company, or for such other purposes as the directors shall think con-

ducive to the interests of the company. Such fund shall be applied for the purposes for which the same shall have been set aside, as and when the directors shall determine. Subject thereto such fund shall belong:

(a) To such preference shares as may, for the time being, be preferential as to dividends and capital to the extent of the dividends, if any, unpaid and to the extent of the amount per share, for the time being paid up on such preference shares.

(b) To the ordinary shares and others, if any, to the extent of the amount per share paid up on such shares. If any surplus the original preference shares and ordinary shares (except as may hereafter be provided with the sanction of an extraordinary resolution as defined by section 129 of the "Companies Act," 1862, passed at separate general meetings of the members of each class) shall rank *pari passu* share for share.

7. The net annual profits of the company, after the deductions aforesaid, as provided for by clause 6 hereof, shall be applied and dealt with as follows:

(a) There shall first be paid thereout any dividend which under the terms of the issue of any shares, as provided in clause 5 hereof, may be payable in priority to the dividends payable on any other shares of the Company.

(b) Subject to such sums (if any) as may be payable under the above sub-section there shall be paid out of the net profits in each year to the holders of the original cumulative preference shares of the Company, a dividend at the rate of 8 per cent. per annum on the amounts for the time being paid up thereon. But should the net profits in any one year be insufficient, after providing for a Reserve Fund as specified in clause 6 hereof, to pay, on the said original cumulative pref-

erence shares, a dividend at the said rate of 8 per cent. per annum, the directors shall pay on the said shares such a dividend as the net profits in that year will provide, any deficiency in the dividend of the preceding year or years, to become payable and be paid out of the profits of the next and subsequent years.

(c) Subject to sub-sections (a) and (b) of this clause, the net profits in each year, after paying in full a dividend at the rate of 8 per cent. per annum on the amounts for the time being paid up on the original cumulative preference shares, and after paying a dividend of 8 per cent. per annum on the amounts for the time being paid up on the ordinary shares, shall become divisible *pro rata* among the holders of the original cumulative preference shares and the holders of the ordinary shares, and on becoming divisible, shall be so divided among them according to the amount of shares held by them and in proportion to the amounts for the time being paid up thereon.

(Endorsement.)

ISSUE OF

£100,000 in 8 per cent. Cumulative Preference Shares,  
£100,000 in Ordinary Shares,

AND

£50,000 in 5 per cent. First Mortgage Debentures.

THE

RIO GRANDE IRRIGATION AND LAND COMPANY, LIMITED.

CAPITAL, - - - £500,000.

PROSPECTUS.

In the District Court of the Third Judicial District of New Mexico, for the trial of causes arising under the laws of the United States.

Joint and several pleas and answer of the Rio Grande Dam & Irrigation Company, and The Rio Grande Irrigation and Land Company, Limited, to the bill of complaint of the United States of America,

*To the Honorable Gideon D. Bantz, Associate Justice of the Supreme Court of the Territory of New Mexico, and Judge of the Third Judicial District Courts thereof:*

#### PLEA.

These defendants by protestation, not confessing or acknowledging the matters and things in and by said bill set forth and alleged to be true, in such manner and form, as the same are thereby and therein set forth and alleged, for plea to paragraph eight of said bill, and to so much of said bill as alleges a ground for the relief sought, that the proposed construction of the dam and reservoir of defendants at Elephant Butte, New Mexico, has never been affirmatively authorized by law, and that such cannot lawfully be made, until the plans of same have been submitted to and approved by the Secretary of War; and to the prayer of relief based on such and similar allegations, these defendants say:

That the site of its proposed construction of the said dam and reservoir at Elephant Butte, in the Territory of New Mexico, and of all and singular its proposed construction of dam and reservoirs is, and are in the Territory of New Mexico, and within the arid region of the United States.

And defendants further say, that by the Acts of, the Congress of the United States, of October 2nd,

1888, and August 30th, 1890, and subsequent similar legislation, it is provided by law among other things for the survey and segregation of lands for reservoir sites in the said arid region by the officers of the Geological survey and the Honorable Secretary of the Interior; that under said Acts of Congress and the rules and regulations adopted thereunder, no restriction whatsoever is or has been placed or named as to the stream or streams whether navigable or non-navigable upon which such reservoir sites might be and have been surveyed and segregated; that under said Acts of Congress the Rio Grande river in the Territory of New Mexico from the northern boundary of said Territory to its southern boundary, has been surveyed under the direction of the Secretary of the Interior and a large number of reservoir sites selected thereon and upon the tributaries thereof; that divers such reservoir sites so surveyed and selected, and among others, reservoir sites numbers Thirty-Eight and Thirty-Nine have been approved and reserved by the Secretary of the Interior acting in accordance with the laws of the United States; that the said reservoir site number Thirty-eight, within the Territory of New Mexico, is situated a short distance above Elephant Butte in Sierra county, New Mexico, and that the said reservoir site number Thirty-nine is situated at or near Palomas, in said county and Territory, some distance below said Elephant Butte; that the lands embraced within said reservoir sites last named and other such sites within the Territory of New Mexico, have as aforesaid been segregated and reserved by the Honorable Secretary of the Interior, the said sites numbers Thirty-eight and Thirty-nine upon November 14th, 1891; that such reservation and segre-

gation of all such sites, including sites numbers Thirty-eight and Thirty-nine, have been recognized and affirmed by various Acts of Congress from August 30th, 1890, down to and including the Act of February 26th, 1897, by which said last mentioned Act, it is provided that all such sites heretofore and hereafter to be approved, should be thrown open to corporate and private entry under the Act of March 3rd, 1891; and that such approval of such reservoir sites by the Congress of the United States and such provisions for the entry of the same by private and corporate parties, are without any reservations or restrictions whatsoever as to the navigability or non-navigability of the streams upon which the same are situated; that upon June 18th, 1897, in accordance with the provisions of the Act of February 26th of the same year, the defendant, The Rio Grande Dam & Irrigation Company has made application in the proper manner for the said reservoir sites numbers Thirty-eight and Thirty-nine, respectively, which said application is now pending.

And for a further plea defendants say, that the defendant The Rio Grande Dam & Irrigation Company is properly organized and doing business under the laws of the said Territory of New Mexico and has complied with all the laws of said Territory in reference to the construction of dams and reservoirs and the diversion of waters of public streams of said Territory, and that having complied with said laws the said defendant is authorized thereunder to construct its dams and reservoirs in the Rio Grande river in said Territory, and divert the waters thereof; and the defendants further say that the said Rio Grande Dam & Irrigation Company having first complied with the local laws, rules and regulations, made and

filed its articles of incorporation and proof of its organization with the Secretary of the Interior, and made its application for its dam and reservoir at Elephant Butte, the construction of which is here sought to be restrained, before the land office at Las Cruces, New Mexico, and that such application and the map and survey of such dam and reservoir has a long time prior hereto and prior to the filing of the bill of complaint herein, been approved by the Secretary of the Interior of the United States, and is yet so approved, and the construction of said dam and reservoir duly authorized under the provisions of an Act of Congress of March 3rd, 1891, under which said Act application for such right to construct such dam and reservoir, was duly made as aforesaid.

And defendants ask, that the various reports of the Geological survey of the United States, and of the Secretary of the Interior, showing such surveys of the Rio Grande river, together with the maps of the various reservoirs and land segregated under authority of law, as well as a certified copy of the map of the survey of the Elephant Butte reservoir, duly approved under the authority of Congress by the Honorable Secretary of the Interior, and herewith offered in evidence, may be made a part of this plea.

All of which matters and things these defendants do aver to be true, and that pleading said statutes, and under said statutes and the acts of the Honorable Secretary of the Interior in bar to the plaintiff's bill, or to so much thereof as hereinbefore particularly mentioned, and pray judgment of this Honorable court, whether they should be compelled to make any other or further answer to the said bill, or to so much thereof as is hereinbefore pleaded to, and pray to be hence

dismissed with their costs and charges in that behalf most wrongfully sustained.

W. A. HAWKINS,  
S. B. NEWCOMB,  
ALBERT B. FALL,  
Counsel for Dfts.

**Territory of New Mexico,**      } ss.  
**County of Grant.**

Wilfred T. Johns, being duly sworn on his oath says, that he is the secretary of The Rio Grande Dam & Irrigation Company and the resident secretary of the Rio Grande Irrigation and Land Company, Limited; that he has read the foregoing plea and that the same is true in every particular in point of fact and that the same is not interposed for delay.

W. T. JOHNS.

Subscribed and sworn to before me this twenty-sixth day of June, A. D., eighteen hundred and ninety-seven.

[ SEAL ]

J. F. POSEY.

## **Notary Public.**

We hereby certify that in our opinion the above plea is well founded in point of law.

A. B. FALL,  
S. B. NEWCOMB,  
W. A. HAWKINS,  
Counsel for defendants.

United States of America, }  
Territory of New Mexico, }

In the District Court of the Third Judicial District of  
the Territory of New Mexico, for the trial of causes  
arising under the laws of the United States.

The joint and separate answer of the Rio Grande Dam & Irrigation Company and the Rio Grande Irrigation and Land Company, Limited, to the amended

bill of complaint of the United States of America, filed by the Attorney General of the United States and the United States Attorney for the Territory of New Mexico in the above styled court.

These defendants now and at all times hereafter saving to themselves all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained for answer thereto or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, answering say:

1st. They admit that The Rio Grande Dam & Irrigation Company is a corporation duly organized under and in pursuance of the laws of the Territory of New Mexico, having its principal place of business in the town of Las Cruces, county of Doña Ana in said Territory, and has for its purposes and objects the construction and maintenance of dams, reservoirs, ditches, canals and pipe-lines as stated in said bill of complaint, and that in pursuance of its purposes of incorporation, it has given out that it is about to construct dams across the Rio Grande in the Territory of New Mexico, such as may be necessary to carry out the objects and purposes of its incorporation, and that it proposes to accumulate and impound water in such reservoirs, and distribute the same through said canals, ditches and pipe-lines, and that the Rio Grande Irrigation and Land Company, Limited, is a corporation organized under and by virtue of the laws of Great Britain, and having its principal office in the City of London, England.

2nd. These defendants admit, that the original defendant, The Rio Grande Dam & Irrigation Company,

has entered into a contract and agreement, for a conveyance to its co-defendant, of some of its rights, in and to its said dams, reservoirs, canals, ditches and pipelines, to be constructed as charged in the bill of complaint herein, and that said defendant, the Rio Grande Irrigation and Land Company, Limited, has claimed and is claiming the right to exercise all of the privileges and rights by it secured, by virtue of said contract, as aforesaid, but in so far as that portion of said bill is concerned, which charges that the Rio Grande Irrigation and Land Company, Limited, is seeking to obtain control of the entire flow of said Rio Grande, and to divert and use the same, these defendants state, that the entire flow of the Rio Grande during the irrigation season at the point or points where these defendants are seeking to construct reservoirs upon the same, has long since been diverted and is now owned and beneficially used by parties other than these defendants, in which diversion and appropriation of said waters these defendants have no property rights and that neither one of the defendants are seeking or have ever sought to appropriate or divert by means of structures above referred to, or contemplated diversion by means thereof of any of the waters of said Rio Grande usually flowing in the bed thereof, during the time when the same are usually put to beneficial use by those who have heretofore diverted the same, but on the contrary these defendants state that it has been their intention and their sole intention by means of the structures which they contemplate and which are complained of in said bill, to store, control, divert and use only such of the waters of said stream as are not legally diverted, appropriated, used and owned by others

and that these defendants have contemplated and now contemplate that any beneficial rights by them acquired in such stream by virtue of such structures will be very largely only so acquired to the excess, storm and flood waters thereof now unappropriated, useless, and which go to waste.

3rd. These defendants deny the statement that the Rio Grande receives no addition to its volume of water between Elephant Butte, at which place defendants admit they propose to erect a dam, and the mouth of the Conchos river as alleged in said bill of complaint, and deny that the character of the soil and the quality of the atmosphere is such in the section of country through which said river flows, that the impounding of such waters, either by means of evaporation or other causes or its distribution over the surface of the earth would prevent any material part of such water from returning to said river bed.

4th. These defendants deny that the said Rio Grande is navigable or has been navigated by steam-boats up to the town of Roma in the state of Texas as is alleged in complainant's bill or that the same is susceptible of navigation or has been navigated above said town of Roma or any point whatever, and deny that said river is susceptible of navigation from the point of rapids mentioned in said complainant's bill above said town of Roma to La Jolla in the Territory of New Mexico, and deny that said river has at any times in the past been used beneficially for the purpose of floating or transporting rafts, logs or poles or that any portion of said stream in said Territory of New Mexico is susceptible of being used and navigated for commercial purposes, and deny that the said river is navigable or susceptible of being navigated for the pur-

pose of carrying on commerce between the Territory of New Mexico and the state of Texas and the Republic of Mexico.

5th. These defendants deny that the impounding of the water of said river by the construction of its said dam and reservoir at Elephant Butte or by any contemplated diversion by it of said waters for the uses above indicated will so deplete and prevent the flow of the water through the channel of said river below said dam as to seriously obstruct the navigability of said river at any point below said dam.

Defendants deny that they are proposing to construct said dam without the authorization of law, but on the other hand state and assert that they have full, complete and lawful authority to construct the same as it so proposes.

6th. These defendants deny that the navigability of said Rio Grande at the city of El Paso and state of Texas has been recognized and acknowledged by the Congress of the United States and the Secretary of War of the United States.

7. And these defendants further answering, deny that by treaty or treaty stipulations between the Government of the United States and the Government of Mexico, it has ever been agreed and declared that neither country shall, without the consent of the other construct any work that may or might impede or interrupt in whole or in part the exercise of said right of free navigation, above the southern boundary line of New Mexico, that is to say, above the parallel of 31 degrees 47 minutes 30 seconds north latitude; and defendants aver that by the treaty stipulations between the said governments it was agreed distinctly that each

government should have absolute sovereignty over the said Rio Grande within its boundaries;

And the defendants further deny that neither of the governments have consented to or authorized the construction of its dam at Elephant Butte, but allege on the contrary that the Government of the United States has consented to and authorized such construction as it has a right to do within its territorial limits.

And now having fully answered each and every allegation in said bill contained, which the defendant is advised it is necessary and material that it should make answer to, the defendants pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

W. A. HAWKINS,  
S. B. NEWCOMB,  
ALBERT B. FALL,  
Counsel for defendants.

Territory of New Mexico, }  
County of Grant.      } ss.

Wilfred T. Johns being duly sworn, upon his oath, says: That he is the secretary of The Rio Grande Dam & Irrigation Company, and the resident secretary of the Rio Grande Irrigation and Land Company, Limited, defendants in the foregoing answer; that he has heard read the said answer, and knows the contents thereof; that the same and each, and every allegation therein contained are true, of his own knowledge, except that he has no personally knowledge of the navigability of the Rio Grande below the town of Roma, in the State of Texas, but that through official data, public maps and statements of witnesses, some of which were sworn to, by said parties, he is informed, and believes that the Rio Grande below the said town of Roma, out to the Gulf,

is not capable of any beneficial use for the purposes of navigation.

W. T. JOHNS.

Subscribed and sworn to, before me this twenty-fifth day of June, A. D., Eighteen Hundred and Ninety-Seven.

J. F. POSEY,

[SEAL]

Notary Public.

In the District Court of the Third Judicial District for the trial of causes arising under the laws of the United States, in the Territory of New Mexico, June 25th, 1897.

The United States,  
No. 140. vs. { Vacation.  
The Rio Grande Dam Co. et al.

Come now the defendants in above entitled cause, by W. A. Hawkins, S. B. Newcomb and Albert B. Fall, their solicitors, and in answer to the rule to show cause heretofore issued, herein file their joint and several plea and answer to the original and amended bill of complaint, and upon the coming in and consideration of the same and the several affidavits filed together with the correspondence and volumes of the 10th, 11th, 12th and 14th annual reports of the Secretary of Interior, part irrigation, and Vol. 3 and 4, report of the Senate committee on arid lands, and report on irrigation, 1893, Secretary of Agriculture, and report of Secretary of War to 51st Congress, with the maps of arid lands, etc. Move this Honorable court here to discharge said rule and to dissolve the injunction heretofore granted herein, and to dismiss the original and amended bills of complaint.

W. A. HAWKINS,

S. B. NEWCOMB,

ALBERT B. FALL,

Counsel for Defts.

In the United States District Court of the Third Judicial District of the Territory of New Mexico.

United States of America,  
No. 140. vs.  
The Rio Grande Dam & Irrigation Company, et al.

Replication of the United States of America, complainant, to the joint and several answer of defendants in the above entitled cause.

This repliant, saying and reserving to himself all, and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereto saith, that they will aver and prove their said bill to be true, certain and sufficient in the law to be answered unto; and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant; without this, that, any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed, and avoided, traversed or denied, is true; all which matters and things this repliant is, and will be, ready to aver and prove as this Honorable court shall direct; and humbly prays, as in and by their said bill they have already prayed.

W. B. CHILDERS,  
United States attorney for  
New Mexico.

In the United States District Court of the Third Judicial District of the Territory of New Mexico.

The United States of America,  
No. 140. vs.  
The Rio Grande Dam & Irrigation Co., et al.

Comes now plaintiff in the above entitled cause and moves the court to set down the joint and several pleas as filed in said cause by the defendants therein, for

argument as to their sufficiency as a defense to said suit, as a matter of law.

\* W. B. CHILDERS,

U. S. Attorney for New Mexico.

In the District Court of the Third Judicial District of  
the Territory of New Mexico.

United States of America,  
Complainant.  
No. — vs.  
The Rio Grande Dam & Irrigation Company, et al.  
Defendants.

Affidavit of Anson Mills, Brigadier General, United States Army, Boundary Commissioner.

State of Texas,  
County of El Paso. { ss.

Anson Mills, of lawful age, being duly sworn, upon oath deposes and says: That he is a Brigadier General in the United States Army, and has been for the past four years on special duty, as Mexican Boundary Commissioner, having in addition to that duty, in charge, together with the Mexican Commissioner, the study of a feasible project for the equitable distribution of the waters of the Rio Grande to all persons residing on its banks or tributaries, having equitable interests therein. That for several years in the past—nearly forty years ago—he resided in El Paso, Texas, and was engaged as an engineer and surveyor in this vicinity, surveying lands in Texas abutting on the Rio Grande. That eight years ago he was for twelve months engaged in the preliminary investigation, by order of the Department of the Interior, for an international dam, projected near this city. That for these reasons, and a general study of the regimen of the Rio Grande, he states with greater confidence than he

otherwise would, his knowledge of the questions submitted to the United States District Court in the Third Judicial District of the Territory of New Mexico, in an amended bill, prepared by United States Attorney Childers, which he has read and is familiar with.

Affiant states that from his own personal knowledge the Rio Grande is now navigated by steam from Brownsville, Texas, to Camargo, Tamaulipas, opposite Rio Grande City, Texas, a distance of about two hundred and fifty miles by the river's course, and from information and belief he states it to have been in former years navigated by steam as far as Roma, a distance of about three hundred miles by the river's course from Brownsville, Texas. The latter information was obtained from Maj. W. H. Emory's (United States Boundary Commissioner) official report of his survey of the boundary line in 1852 to 1855, and from the verbal statements of Captain Kelly, of Brownsville, Texas, who has been in the steamboat business for over thirty years, and who stated to affiant that at the time of the Maximilian war he had thirty steamboats in his service, operating between Brownsville, Texas, and Camargo, Tamaulipas, and that at the same period, the United States government had many additional vessels engaged in the same business, as well as several gunboats plying on the river, but at this date, his fleet has been reduced to one small vessel, the "Steamer Bessie," and that said Captain Kelly informed him by reason of the depletion of the depth of the channel of the Rio Grande, that it was now very difficult for him to navigate this one small vessel with very light draft.

And affiant further states that from information and belief, that the river has been navigated by sail boats,

flat boats and small boats above Roma, Texas, to a point about one hundred and fifty miles below Presidio del Norte, Texas. That he obtained this information from the aforesaid Major Emory's report, wherein it is stated that he procured a number of small boats built in San Antonio, Texas, and carried them to a point about one hundred miles above the mouth of Devil's river, and that his engineers used them for taking the topography of the country and surveying the boundary line; and from a report of Captain Love, in the employ of the quartermaster's department of the United States army, who claims to have carried a small boat up the river to within one hundred and fifty miles below El Paso, Texas, but affiant believes that he was mistaken in the point described, as in those days El Paso was known as El Paso del Norte, and Presidio, as Presidio del Norte, and affiant is of the opinion that he had Presidio del Norte in view in his report instead of El Paso del Norte, as written. Affiant further states that in 1858 he, with a party constructed and floated a raft of logs from a point known as El Canutillo, above El Paso, Texas, down to El Paso, for building purposes, and that he is informed and believes that the same has been done by many other parties about that time, the names of whom he is now unable to remember; and that recently a party constructing the Postal Telegraph Company's line, used the river's current for floating their telegraph poles down the river at a point near La Joya, New Mexico.

Affiant further states that in past years, namely forty years ago, there was comparatively an abundance of water in the river, and that it seldom went dry (about only once in seven years) and then for a very short period, generally about the month of August or Sep-

tember. That in later years the waters have been much depleted during the summer and fall, but the flood waters of the spring are still great and last from one to two months, during which period they are susceptible of carrying small boats, flat boats, rafts and logs. At times, periodically each year, the volume of water is so great that steamboats could navigate it for hundreds of miles both above and below El Paso, Texas.

Affiant further states that he has been engaged under the Geological Survey, in taking the flow of the river for a full year at El Paso, Texas, and has had access to the gaugings of the flow of the Rio Grande for many years both there, and at Embudo and Rio Grande, in the Territory of New Mexico.

Affiant further states, that there are no tributaries of the river of any importance below Embudo to El Paso, or for two hundred miles below El Paso to the mouth of the Conchos river. That while engaged in gauging the flow of the river, he was also engaged in observing the evaporation and discovered that the evaporation was over six feet from the surface per annum at El Paso, Texas, and as the region is arid for two hundred miles above and below El Paso, it is presumed that the evaporation would be about the same for that distance, and that the impounding of a large quantity of the flow of the river in a lake as proposed would, in his opinion, largely increase the ordinary evaporation of the waters, as would also the distribution of the waters through numerous canals and ditches, as proposed, through the arid soil, and in addition thereto, there would be still a great loss by seepage into the dry and porous earth, a very small portion of which seepage would, in all probability, return to the river, and this opinion is based upon his actual observation and knowledge of the irrigating systems of this country, soil and climate.

Affiant further states, that the Rio Grande receives the greater portion of its waters from its tributaries in Colorado and New Mexico, above Elephant Butte; that its next important tributary is the Conchos river, which empties into the Rio Grande about two hundred miles below El Paso, Texas. That in the past ten years, the numerous ditches and canals taken out of the head waters of the river in Colorado and Northern New Mexico, have impaired the navigable capacity of the river continuously below to the Gulf during the summer months, but have not entirely destroyed it. What is stated just above generally, will be shown specifically in detail by an official report of Assistant Engineer W. W. Follett, on his investigations of the upper waters of the Rio Grande in Colorado and New Mexico, dated November 17th, 1896.

Affiant further states, that in an official investigation, superintended by him, of a proposed lake similar to the one proposed with a dam sixty feet high, it was discovered that the cubic contents of the entire reservoir would be 537,340 acre feet and that if full of water, the evaporation from the surface for one year, would be six and one-half feet off the surface or 130,000 acre feet of the total cubic contents of 537,340 acre feet, just about one-fourth the cubic contents of the lake. The evaporation was measured by actual tests in the most skilled methods now known.

ANSON MILLS.

Subscribed and sworn to before me this, the 23rd day of June, A. D. 1897.

D. H. HART,

Clerk of U. S. District Court,

[SEAL]

W. D. T.

By J. P. HODGSON,

Deputy.

+  
X

This indenture made the thirtieth day of May, in the year one thousand eight hundred and ninety-six, between The Rio Grande Dam & Irrigation Company, a corporation organized under and by virtue of the laws of the Territory of New Mexico and the provisions of an Act of the Legislative Assembly of the said Territory, approved February twenty-fourth, one thousand eight hundred and eighty-seven, and to all laws amendatory thereof, party of the first part, and the Rio Grande Irrigation and Land Company, Limited, a corporation organized under Companies Acts, of the United Kingdom of Great Britain, and Ireland, 1862 to 1890, party of the second part:

Whereas, the Government of the United States of America, did on the first day of February, one thousand eight hundred and ninety-five, grant unto the party hereto of the first part, certain exclusive rights, privileges, franchises and concessions to be exercised and enjoyed in the manner and within the area hereinafter set forth, to appropriate the waters of the Rio Grande river, to erect dams, weirs, ditch-heads, canals, reservoirs and all other works in connection with irrigation, for public and private purposes, and in connection with the said purposes, to locate, establish and maintain rights of way, for the conveyance of water over certain public and private lands mentioned hereinafter, together with the right and privilege to occupy all lands subject to overflow, by reason of the erection of the aforesaid dams and reservoirs, canals and other irrigation works, and fifty (50) feet on both sides of the said water-ways and canals, and the right of taking and using from such lands, such timber, earth and stone as may be needed in constructing any of the aforesaid works, and any works and buildings in connection therewith, and:

Whereas, the party of the first part, has in consideration of divers valuable considerations, agreed to enter into these presents, now, therefore:

This Indenture Witnesseth, that the said party of the first part, for, and in consideration of the rents, covenants and agreements herein-after mentioned, reserved and contained, on the part and behalf of the said party of the second part, its successors and assigns, to be paid, kept and performed, has leased, demised and to farm, let and full liberty given to enjoy and exercise, and by these presents, does lease, demise and to farm, let and full liberty give to enjoy and exercise, unto the said party of the second part, its successors and assigns, all and singular the property of whatsoever nature, and wheresoever situated, of and belonging to the said party of the first part, and all appurtenances thereto belonging or in anywise appertaining, including all the rights, privileges, franchises and concessions granted to the said party of the first part, by any and all acts of the Government of the United States of America, or by any and all orders, rules, certificates, patents, decrees or charters of any and all departments of the said Government of the United States as hereinbefore referred to, and by any and all laws, acts, charters and authorities of the said Territory of New Mexico, authorizing and empowering the said party of the first part, to locate, establish and maintain rights of way for the conveyance of water over public and private lands in the said Territory of New Mexico and elsewhere and to construct and maintain dams, reservoirs, canals, ditches and pipe-lines for the purpose of impounding and supplying water for irrigation, min-

ing, manufacturing, domestic and other uses to private and public consumers and to towns and cities for municipal and commercial and all other purposes and to acquire and dispose of lands and other property in connection therewith, and to colonize and improve the said lands.

All of which rights, privileges, franchises and concessions are to be enjoyed in the manner, and the lands are situate in the area, more particularly described as follows:

That is to say, the beginning point and terminus of the main line of such canals, ditches and pipe-lines shall be deemed to begin at the dam or dams to be built across the Rio Grande at any point or place or various places within townships thirteen (13) and fourteen (14) and ranges three (3) and four (4) west in Sierra county, New Mexico, and to terminate at any point or place and various and several places in the Territory of New Mexico, State of Texas and Republic of Mexico, to which it may be practical to carry the waters so accumulated, and the general courses and directions of such new canals, pipe-lines and ditches shall be southerly and southeasterly along the Rio Grande and through the Mesilla Valley and the El Paso Valley and into the Republic of Mexico and southwesterly and easterly to such places as may be practical to extend the said canals, pipe-lines and ditches and convey the water so accumulated, and the lengths thereof shall be from fifty miles to five thousand miles, it being impossible to state the point of beginning, terminus, course and length of the said canals, ditches and pipe-lines more definitely.

To have and hold the said above mentioned and described premises, with the appurtenances and

grants and franchises, unto the said party of the second part, its successors and assigns, from the first day of June, one thousand, eight hundred and ninety-six, for and during and until the full end and term of forty-seven years, thence next ensuing and fully to be completed and ended. Yielding and paying therefore unto the said party of the first part, its successors or assigns, yearly and every year during the said term hereby granted, the yearly rent and sum of one dollar, lawful money of the United States of America, when demanded. Provided, always, nevertheless, that if the yearly rent above reserved, when demanded, or any part thereof, shall be behind or unpaid on any day of payment, whereon the same ought to be paid as aforesaid, or if default shall be made in any of the covenants herein contained on the part and behalf of the said party of the second part, its successors and assigns, to be paid, kept and performed, then and from thenceforth it shall and may be lawful for the said party of the first part, its successors and assigns, into and upon the said demised premises and every part thereof, wholly to re-enter and the same to have again, re-possess and enjoy as in its first and former estate, anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

And the said party of the second part for itself and its successors and assigns, doth covenant and agree to and with the said party of the first part, its successors and assigns, that it shall and will yearly and every year during the term hereby granted, well and truly pay or cause to be paid unto the said party of the first part, its successors and assigns, the said yearly rent above reserved, when demanded on the days and in the

manner limited and prescribed as aforesaid, for the payment thereof without any deduction or delay according to the true intent and meaning of these presents. And the said party of the second part, for itself and its successors and assigns, doth covenant and agree that it shall and will at its own cost and charge bear, pay and discharge all such present and future taxes, whether special or general and all duties and assessments whatsoever as shall or may during the said term hereby granted be levied, charged or assessed or imposed upon the said described premises or any part thereof, by virtue of any present or future law of the United States of America, or of the Territory of New Mexico.

And the said party of the second part, its successors and assigns, doth covenant and agree that it shall and will at its own costs as often as occasion shall require, of which the said party of the second part, its successors and assigns, shall be the sole judge, well and sufficiently repair, support and maintain and keep in good and substantial repair and condition the property and premises subject to such repair hereby demised, or expressed so to be, and also all other, the erections, works and buildings which shall at any time during the said term be erected and set up, in or upon the said demised premises and the same in such good and substantial repair and condition, shall and will at the expiration or sooner determination of the said term of forty years, peaceably and quietly surrender and give up unto the said party of the first part, its successors and assigns, the reasonable use and wear thereof in the meantime only excepted.

And the said party of the first part, for itself and its successors and assigns, doth covenant and agree by these presents, that the

said party of the second part, its successors and assigns, paying the said yearly rent above reserved and performing the covenants and agreements aforesaid on his or their part shall, and may at all times during the said term hereby granted, peaceably and quietly, have, hold and enjoy the said demised premises without any let, suit, trouble or hinderance of or from the said party of the first part, its successors or assigns, or any other person or persons whatsoever.

And the said party of the first part for itself and its successors and assigns, doth covenant and agree by these presents, that in the event that the said party of the first part shall be granted or may acquire or obtain a renewal or extension of the rights, privileges, charters and franchises, which it now holds and possesses by virtue of certain orders and grants by and from the government of the United States of America and by virtue of the acts and laws of the Legislative of the Territory of New Mexico, then and in that event the said party of the first part will renew and extend to the party of the second part, the term of these presents to the full extent and term of such renewal and extension so granted to the party of the first part, less the period of one day, at the same rent and subject to the same covenants and conditions as are herein reserved and contained, and the said party of the first part, for itself and its successors and assigns, doth further covenant and agree with the party of the second part, that it will upon request of the party of the second part and at its expense, convey and assign to the party of the second part absolutely the premises hereby demised.

In witness, whereof the parties hereto have caused

their respective corporate seals to be hereunto affixed the day and year first above written.

[ SEAL.]

The corporate seal of the Rio Grande Dam & Irrigation Company was hereunto affixed in the presence of Nathan E. Boyd, as attorney for the Rio Grande Dam & Irrigation Company in fact.

The common seal of the Rio Grande Irrigation and Land Company, Limited, was by the order of the board of directors affixed in the presence of

W. J. ENGLEDUE,

WINCHILSEA & N.

Directors.

N. P. ALLISON,

Secretary.

Kingdom of Great Britain and  
Ireland, City of London, } ss.  
England. }

On the thirtieth day of May, A. D., 1896, before me appeared Nathan E. Boyd, to me personally known, who being by me duly sworn, did say that he is attorney in fact of the Rio Grande Dam & Irrigation Company, and that the seal affixed to the within instrument is the corporate seal of the said corporation, and that the said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and the said Nathan E. Boyd acknowledged said instrument to be the free act and deed of said corporation.

Also on the same day before me appeared William John Engledue, Colonel retired in her Majesty's Royal Engineers and The Right Honorable Murray Edward Gordon, Earl of Winchilsea and Nottingham and Nathaniel Paul Allison, to me personally known, who being by me duly sworn, did say that they are respec-

tively, two of the directors and the secretary of the Rio Grande Irrigation and Land Company, Limited, and that the seal affixed to the said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and the said William John Engledue, The Right Honorable Murray Edward Gordon, Earl of Winchilsea and Nottingham, and Nathaniel Paul Allison acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL] PATRICK A. COLLINS,  
Consul General of the United States of  
America, at London, England.

Filed for record in my office this twentieth day of June, A. D. 1896, at 1 o'clock p. m., and duly recorded in Book of Deeds No. 18, pages 120, 121, 122, 123 and 124, records of Doña Ana County, N. M.

[SEAL] H. F. STEPHENSON,  
Recorder.

Territory of New Mexico, }  
Sierra County, } ss.

This instrument was filed for record on the 26th day of June, A. D. 1896, at 8 o'clock, a. m., and duly recorded in Book B, on pages 490 to 494 inclusive.  
Miscellaneous Records.

[SEAL] THOS. C. HALL,  
Recorder.

Territory of New Mexico, }  
Sierra County. } ss.

I, Thos. C. Hall, Probate Clerk and ex Officio Re-

corder in and for said county, in the Territory aforesaid, do hereby certify that the foregoing is a true and correct copy of an instrument as the same appears of record in my office.

[SEAL] In testimony I have hereunto set  
my hand and official seal at my  
office in Hillsboro, New Mexico,  
this 1st day of July, A. D. 1897.

THOS. C. HALL,  
Probate Clerk and ex-Officio Recorder.

Territory of New Mexico, { ss.  
County of Dosia Ana. }

We, the undersigned, desiring to form a company pursuant to the laws of the Territory of New Mexico and to the provisions of an act of the Legislative Assembly of said Territory, approved February 24th, 1887, and to all laws amendatory thereof:

Do hereby make, sign and acknowledge these articles of incorporation and do hereby set forth and certify as follows:

First. The full name of the incorporators are Edwin C. Roberts, Edward V. Berrien, John L. Campbell, Peter E. Kern, Phoebus Freudenthal, John H. Riley, Solomon Schulz, Albert M. Loomis, and L. Bradford Prince; and the corporate name of such company is The Rio Grande Dam & Irrigation Company.

Second. The purposes for which said company is formed are, for the purpose of constructing and maintaining dams, reservoirs and canals, and ditches and pipe-lines for the purpose of supplying water for the purpose of irrigation, mining, manufacturing, domestic and other public uses, including supply of water for cities and towns, for municipal and commercial uses, and for power and all other useful purposes to which

water can be supplied, and for the purpose of colonization and the improvement of lands in connection therewith; and for such other purposes, and with such other objects, powers and privileges as may be permitted or conferred by general or special acts of this Territory, or by the act of Congress of the United States or the Government of Mexico. And it is the purpose of this company to carry on and transact any and all operations pursuant to the purpose and within the powers herein set forth as well in the Territory of New Mexico, and the state of Texas and the Republic of Mexico; and to acquire, mortgage and dispose of property, and transact business in any place or jurisdiction within or without the United States of America. And the beginning point and terminus of the main line of said canals, ditches and pipe-lines shall be to begin at the dam or dams to be built across the Rio Grande, at any point or place or various and several places within township thirteen (13) and fourteen (14) and ranges three (3) and four (4) west, in Sierra county, New Mexico, and to terminate at any point or place and various and several places, in the Territory of New Mexico, state of Texas, and Republic of Mexico, to which it may be practicable to carry the waters so accumulated; and the general courses and directions of such canals, pipe-lines and ditches, shall be southerly and southeasterly along the Rio Grande, and through the Mesilla valley and the El Paso valley, and into the Republic of Mexico, and southwesterly and easterly to such places as may be practical to extend said canals, pipe-lines and ditches and convey the waters so accumulated, and the length thereof shall be from fifty miles to five thousand miles, it being impossible to state the point of beginning, terminus, course and length of said canals, ditches and pipe-lines more definitely at this time.

Third: The amount of capital stock shall be five million dollars, to consist of fifty thousand shares of one hundred dollars each.

Fourth: The term of existence of said company shall be fifty years.

Fifth: The number of directors shall be nine, and the names of those who shall manage the business of the company for the first year are: Edwin C. Roberts, Edward V. Berrien, John L. Campbell, Peter E. Kern, Phoebus Freudenthal, John H. Riley, Solomon Schulz, Albert M. Loomis, and L. Bradford Prince, stock holders of said company, and the majority of whom are residents of the United States, and at least one-third of whom are residents of this Territory.

Sixth: The name of the city and county in which the principal place of business of the company is to be located are city of Las Cruces, county of Doña Ana, within the Territory of New Mexico, with offices also in El Paso, Texas, the city of Juarez, Mexico.

In witness whereof, we have hereunto set our hands and seals this twelfth day of January in the year eighteen hundred and ninety-three.

E. V. BERRIEN,	[SEAL]
EDWIN C. ROBERTS,	[SEAL]
PHOEBUS FREUDANTHAL.	[SEAL]
JNO. H. RILEY,	[SEAL]
J. L. CAMPBELL,	[SEAL]
A. M. LOOMIS,	[SEAL]

Territory of New Mexico, }  
County of Doña Ana. } ss.

On this sixth day of September, eighteen hundred and ninety-three, before me personally appeared Edwin C. Roberts, Edward V. Berrien, John L. Campbell, Phoebus Freudenthal, John H. Riley, Albert M. Loomis,

to me known to be the persons described in, and who executed the foregoing articles of incorporation, and severally acknowledged that they made, signed and executed the same as their free acts and deeds.

In witness whereof, I have hereunto set my hand and notarial seal, at my office in Las Cruces, the day and year last above written.

MORRIS FREUDENTHAL,

[SEAL]

Notary Public,

Doña Ana County, Nuevo Mexico.

Territory of New Mexico, }  
Office of Secretary. } ss.

I have compared the preceding copy of "The Rio Grande Dam & Irrigation Company," with the original thereof on file in this office, and I hereby certify the same to be a correct transcript therefrom and of the whole thereof.

Witness my hand and the seal of the Secretary of the Territory, at Santa Fe, the twenty-fifth day of January, one thousand eight hundred and ninety-six.

LORION MILLER,

[SEAL]

Secretary of New Mexico.

[PUBLIC—No. 280.]

An act to authorize the construction and operation of a street-railway and wagon bridge across the Rio Grande, between the city of El Paso, Texas, and Paso del Norte, Mexico.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress is hereby given to the Santa Fe Street Railway Company, a corporation organized and created under and by virtue of the laws of the State of Texas, to construct, own, maintain and operate a street railway and wagon bridg*

across the Rio Grande, between the city of El Paso, in the State of Texas, and Paso del Norte, State of Chihuahua, Mexico, at such point as may be most convenient to said corporation to unite and connect a street railway to be constructed by it in the said city of El Paso with any street railway that may be constructed by any person, persons or company in said Paso del Norte; and to build and lay on and across said bridge ways for the passage of animals, foot-passengers, and vehicles of all kinds, and for the transit of freight, goods, wares and merchandise, for which said corporation may charge a reasonable toll, which charge shall be subject to revision and regulation from time to time by the Secretary of War.

Sec. 2. That said bridge shall be built of good, substantial material, and of such strength and dimensions as may be sufficient to render the passage of all such vehicles, animals and persons as are herein mentioned perfectly safe at any and all times.

Sec. 3. That said bridge shall not interfere with the free navigation of said river, and in case of any litigation arising from an obstruction or an alleged obstruction to the free navigation thereof, caused or alleged to be caused by said bridge, the case may be tried before the Circuit or District Court of the United States for the State in which any portion of said bridge may be situated.

Sec. 4. That equal privileges in the use of said bridge shall be granted to all telegraph companies, and the United States reserves the right for the establishment of a postal telegraph across said bridge.

Sec. 5. That the consent of the State of Chihuahua, United States of Mexico, and of the proper authorities of the Republic of Mexico shall have been obtained before said bridge shall be built or commenced.

Sec. 6. That unless the construction of said bridge be commenced within one year and finished within three years from the date of the passage of this act, the provisions of this act shall be null and void.

Sec. 7. That Congress reserves the right to withdraw the authority and power conferred by this act, in case the free navigation of said river shall at any time be substantially or materially obstructed by said bridge, or for any other reason, and to direct the removal or necessary modifications thereof at the cost and expense of the owners of said bridge; and Congress may at any time alter, repeal, or amend this act.

Approved, September 6, 1888.

[ PUBLIC—No. 183.]

An Act to authorize the construction of a street-railway and wagon-road bridge over the Rio Grande River between the city of El Paso, Texas, and Paso del Norte, Mexico.

*Be it Enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the El Paso Street Railway Company, a corporation organized and created under and by virtue of the laws of the State of Texas, be, and is hereby, authorized and empowered to construct, own, maintain, and operate a street railway bridge over the Rio Grande river between the city of El Paso, in the State of Texas, and the city of Paso del Norte, in the State of Chihuahua, Mexico, at such point as may be most convenient to said corporation to unite and connect the street-railroad to be constructed by them in the said city of El Paso with any street-railroad that may be constructed by any person or company in the said city of Paso del Norte, and to build and lay on and across said bridge, ways for the passage of animals,

foot-passengers, and vehicles of all kinds, for the transit of which said corporation may charge a reasonable toll, which charge shall be subject to revision and regulation by the Secretary of War from time to time.

Sec. 2. That said bridge may be built with unbroken and continuous spans, of the following dimensions, to-wit: Six hundred feet in length, twenty feet in width, ten feet in height above high water level, and with twenty-eight spans, twelve of which to be thirty feet in length and sixteen of which to be fifteen feet in length; that said bridge when completed in the manner herein specified shall be deemed and taken to be a legal structure: *Provided*, That said bridge shall not interfere with the free navigation of said river; and in case of any litigation arising from an obstruction or alleged obstruction to the free navigation thereof caused or alleged to be caused by said bridge, the case may be tried before the District Court of the United States of the State in which any portion of said bridge may be situated: *And provided also*, That Congress reserves the right to withdraw the authority and power conferred by this Act, in case the free navigation of said river shall at any time be substantially or materially obstructed by said bridge, or for any other reason, and to direct the removal or necessary modifications thereof at the cost and expense of the owners of said bridge; and Congress may at any time alter, repeal, or amend this Act. *And provided further*, That the consent of the Mexican State of Chihuahua, and of the proper authorities of the Republic of Mexico shall have been obtained before said bridge shall be built or commenced.

Approved July 28, 1882.

Territory of New Mexico, }  
County of Grant.      } ss.

Wilfred T. Johns, being duly sworn on his oath, says, that he is the secretary of the Rio Grande Dam & Irrigation Company and the resident secretary of the Rio Grande Irrigation and Land Company, Limited, the defendants in the injunction suit now pending against them in the District Court of the Third Judicial District of the Territory of New Mexico, at the instance of the United States.

That previous to last January they had expended a large amount of money in the completion of its surveys and the gathering of the data for the construction of its physical works in the Territory of New Mexico, and that previous to last January it had let its contracts for the construction of a large portion of the same, including a portion of its irrigation canals in Dona Ana county and also some of its smaller dams and pipe-lines to be used in conjunction with its main Elephant Butte dam and reservoir, and that the work of such construction had progressed so far in the county of Dona Ana aforesaid, that said New Mexico company had laid out and expended in such construction work alone, exclusive of such surveys, the sum of about ninety thousand dollars (\$90,000.00), and all told including surveys up to that time and the salaries of its officials, it had paid out and expended about one hundred and fifty thousand dollars (\$150,000.00).

That such physical work so constructed by it to the value of ninety thousand dollars was so constructed in the bed and along the shores of the Rio Grande; that at the time of the service of the injunction in this case upon said company it had let the contract and was responsible thereunder in addition to the amount so ex-

pended by it as aforesaid, for a largely increased amount beyond the same; that its contractor was then engaged in the preparation for such works, and said company had also procured the services of, retained and then had in their employ and under contract, a large number of skilled and other employees.

That the granting and service of said injunction upon this defendant necessitated the abandonment of a force which had been gathered for the prosecution of such work by the said contractor, and greatly to the damage and injury of said defendants in the delay in the prosecution of its said work and created wide-spread fear and distrust and dissatisfaction on the part of said company's stockholders, as greatly to injure its financial credit and standing, and threaten its existence as such an enterprise.

Affiant further says that to any longer continue the injunction in this cause would force the said defendants to a loss of those works heretofore constructed by them in the way of ditches, canals and pipe-lines, because it would be impossible to preserve those portions already constructed, except by using the same in connection with the perfected system of which they will form a part when the same is completed,

Affiant further says that according to the history of the Rio Grande river said defendants have a right to expect that the waters therein will be dry or practically so within a short period, and that then if unrestrained by injunction, said companies may prosecute said work and complete the same in and along the bed and banks of said river at a great deal less expense than if they are compelled to carry on and effect such works during a season when the river is flushed with water.

W. T. JOHNS.

Subscribed and sworn to before me this twenty-sixth day of June, A. D. eighteen hundred and ninety-seven.

[SEAL]

J. F. POSEY,  
Notary Public.

Territory of New Mexico, } ss.  
County of Grant.

Henry S. Gillett, being duly sworn, on his oath says: That he is a resident of the County of Grant, and Territory of New Mexico; that in 1849, and from that time until sometime in 1860, some odd, he lived in El Paso, Texas; that he has been intimately acquainted with the Rio Grande river at El Paso, Texas, and at points above there, in New Mexico ever since 1849; that from said date and up to 1862 or '63, when affiant left El Paso, the Rio Grande was practically in all essential features the same character of stream that it is to-day; the same sand banks, and sand bars, the same scarcity of water, the same immense floods coming up and going down with great rapidity; that practically during every year, while affiant lived at El Paso, the said river at said place was dry, and during such seasons, affiant frequently and almost every year, crossed the dry bed thereof at that place; that during the season when the same was not dry, there would be a small volume of water only passing there, possible only two feet deep and from thirty to fifty yards wide; that when affiant first became acquainted with the river, its waters were diverted at and near El Paso by an old Mexican, who was farming with the same, and during all the time that affiant remained acquainted with the same there was an old Mexican dam in the same, just above the town of El Paso, which would have absolutely cut off all navigation, had it been possible to navigate said river with the amount of water there was in it on an average;

affiant says that said dam had been at such place in said river, so affiant was informed, from the time whereof the memory of man runneth not to the contrary, and affiant is informed that the same is still maintained at said place; affiant says that said river never was navigable at said town of El Paso or above or below, within the knowledge of affiant, that it was never used for any purpose by the people except for watering stock and for diverting for agriculture; that affiant has been informed that one Brigadier General Mills has made an affidavit in this case, that back in 1858, he, the said Mills, constructed a raft at Canutillo and floated the same down to El Paso; affiant says that it is possible that the said Mills did this during a high water period, but that if so, the logs referred to could have been nothing more than small cottonwood poles, because that was the only kind of timber that ever has been grown near said place of Canutillo; that said place was then and still is familiar to affiant.

Affiant further says that such a case must have been an isolated instance and affiant knows that such river was not beneficially used for such purposes as a usual thing.

Affiant further says that during the high floods of said river it is impossible to navigate the same with boats, both because of the shifting, changing bed and the fact that the water spreads out all over the valleys through which it flows and also because it flows with such terrific force.

Affiant further says that said Rio Grande has no navigable capacity and is not susceptible of navigation at any point where affiant knows the same.

HENRY S. GILLETT,

Subscribed and sworn to before me this twenty-sixth

day of June, A. D., eighteen hundred and ninety-seven

[SEAL.]

J. F. POSEY,

Notary Public.

Territory of New Mexico, { ss.  
County of Grant. }

A. K. Watts, being duly sworn, on his oath says: That he has known the Rio Grande River in New Mexico ever since 1864, when he was stationed along its course at different places, as United States soldier, and that since said time, business and pleasure have often taken him across and along its course; that the same has never been a navigable river, or had any navigable capacity since his acquaintance with it; that his knowledge is so close and thorough of it, that he is able to state to the court substantially from the same alone, that neither trees, nor rafts, nor boats have ever been floated by the people for pleasure or commerce in New Mexico upon its waters, except that some lone instance may have occurred where for a short distance the same could have been floated, or in some unusual flood some venturesome person may have undertaken to go down the same in a boat; that affiant has heard of such instances, but never heard of one except where the party thus attempting to navigate the stream came to grief; that it is practically now in the same condition that it was when he first became acquainted with it in 1864; has seen the stream go dry in dry seasons, swelling with floods which rapidly rise and fall quickly, changing its banks and course, always treacherous and of such a character that the community laughs when any one describes it as navigable.

Affiant further says that even at the highest floods in the stream, because of its treacherous character, of the

great fall which it has, that it is incapable of navigation; and further affiant sayeth not.

A. K. WATTS.

Subscribed and sworn to before me this twenty-sixth day of June, A. D., eighteen hundred and ninety-six.

J. F. POSEY,

[SEAL]

Notary Public.

Territory of New Mexico,      } ss.  
County of Grant.      }

Dr. Lewis Kennon, being duly sworn, on his oath says: That he resides in Silver City, New Mexico, but has known the Rio Grande intimately since 1853; that during considerable portions of such period, affiant has at various times lived along the course of the Rio Grande, in the Territory of New Mexico; that the general characteristics of said river at the present time are substantially the same as when affiant first knew it in 1853; that the same is not and never has been a navigable stream in New Mexico, or capable or susceptible of being navigated; that it has never been beneficially used by the people in New Mexico for commercial purposes and is incapable of such beneficial use by reason of its rapids, its quick sands, sand bars, shifting banks and lack of water; that during the period when affiant has known it he has never known of it being used for floatage of logs or rafts or boats; that even at its high flood season in New Mexico it is incapable of being navigated because of the reasons aforementioned.

LEWIS KENNON.

Subscribed and sworn to before me this twenty-sixth day of June, A. D., eighteen hundred and ninety-seven.

[SEAL]

J. F. POSEY,

Notary Public.

Territory of New Mexico, } ss.  
County of Grant. }

James Brent, being duly sworn, on his oath says: That he has known the Rio Grande river for as many as seventeen years; that he has crossed it a great many times and camped along its shores; that it is not navigable anywhere in New Mexico; neither has it any navigable capacity, that it is full of rapids and sand bars and has never been used and is incapable of being used by the people for floating logs, except you would pursue each log and get it off the sand bars, and neither can they float rafts or boats thereon; affiant further says that even in its highest floods it would be impossible for a boat to navigate the same; that there is no timber along its banks which can be floated thereon.

And further affiant sayeth not.

JAS. R. BRENT.

Subscribed and sworn to before me this 26th day of June, A. D. eighteen hundred and ninety-seven.

[SEAL]

J. F. POSEY,  
Notary Public.

Territory of New Mexico, } ss.  
County of Grant. }

Richard Hudson, being duly sworn, on his oath says: That he became familiar with the Rio Grande in New Mexico, in the spring of 1863 as a volunteer officer of the United States Army, stationed at El Paso, and that he remained at said place of El Paso and at points up and down the Rio Grande, from 1863 to 1866; that during such period affiant had every opportunity to observe and did observe the flow of the water and the general condition of the Rio Grande; that during such period, the exact date of which affiant does not remember, said Rio Grande was dry at El Paso and above El

Paso for considerable distance, and that this occurred for several periods during such time, a year or more apart; that affiant was then and ever since has remained familiar with the navigable capacity of said river in New Mexico; and that from his own knowledge states that the same at no point in New Mexico during such period has ever been navigable, in the sense that it was put to any beneficial use or could be put to any beneficial use by the people living in the section of the country through which it flows, except for watering stock and diverting its waters; which custom of diverting its waters was in vogue at the time affiant came to this country and affiant has reason to believe for a long time prior thereto; that during the time when affiant was stationed on said river as an officer and during the period since that time, affiant has never known any rafts, boats or crafts of any kind to have been used by the people upon such river, except to cross the same during flood times, and affiant unhesitatingly says that it has at all times remained incapable of any such use; that even during its high flood seasons it is incapable of any such use by either rafts or boats; it is incapable of being used for beneficially floating logs on account of the sand bars in its channel and the difficulty of keeping such logs in the water even if there was any timber along its banks, which affiant states there is not at any point within the Territory of New Mexico, and that if anybody ever floated rafts in the same, such rafts must have been comprised of small cottonwood trees or small underbrush and must have been inspired with the desire of achieving the impossible, than to accomplish any beneficial purpose.

RICHARD HUDSON.

Subscribed and sworn to before me this twenty-sixth

day of June, A. D. eighteen hundred and ninety-seven.

[ SEAL ]

J. F. POSEY.

Notary public.

Territory of New Mexico, { ss.  
County of Grant.

John D. Bail, being duly sworn, on his oath says: That he resides in Silver City, New Mexico, at present, but that he has known the Rio Grande in the Territory of New Mexico from its Texas boundary north, for a period of thirty years, and during the time before railroads were known in New Mexico, he has staged along its course from point to point in said Territory a great deal; that he resided upon the same at Las Cruces and Mesilla for a period of ten years; that from his own knowledge of the uses which have been made of such river, and from its capacity, he states that the same is not navigable in the way he understands that term, that is, that it is not capable in its natural condition of being put to any beneficial uses as a highway for commerce or for pleasure; that even during its flood times he never has known it to be navigated or put to any useful purpose, and in his own opinion it is, even at such periods, incapable of being navigated.

Further affiant sayeth not.

JNO. D. BAIL.

Sworn and subscribed before me this \_\_\_\_\_  
day of June, A. D., eighteen hundred and ninety-  
seven.

J. F. POSEY,

[ SEAL ]

Notary Public.

Territory of New Mexico, { ss.  
County of Grant.

James T. Reed, being duly sworn, on his oath says:  
That he is a surveyor and civil engineer by profession;

that he has been engaged ever since 1880 in New Mexico in making surveys both of a government and private character; that he is a United States mineral surveyor and that he is acquainted with the Rio Grande river from Fort Quitman in Texas, about seventy-five miles below El Paso, to the town of Albuquerque; that the same is unnavigable, incapable of being navigated and unsusceptible of being navigated and in fact has not since affiant become acquainted with the same ever been navigated from said place of Fort Quitman to said place of Albuquerque; that this lack of navigable capacity is caused by the river for its entire distance being a sand bank, shifting current, shallow stream and even in its highest floods it is impossible of navigation because of its shifting, cutting and filling up characteristics, and because of the force of its current; that it is now practically the same character of stream as when affiant first knew it in 1880; that since 1880 affiant has even known it to be dry in New Mexico, and that in the year 1880 affiant traveled along the course of the Rio Grande from Fort Quitman to El Paso and had to dig in the bed of the Rio Grande for sufficient water for himself and his animals, from said Fort Quitman up to Fort Rice, a distance of ——— miles.

Affiant says that it cannot be used even for floating timbers and that even if it could, there is no valuable timber capable of use along its banks or tributary thereto.

JAMES T. REED.

Subscribed and sworn to before me this twenty-sixth day of June, A. D., eighteen hundred and ninety-seven.

[SEAL]

J. F. POSEY.  
Notary Public.

Territory of New Mexico, } ss.  
County of Grant, } ss.

Ricard L. Powel, being duly sworn, on his oath, says: That since the year 1880 he has been engaged as a United States Government Surveyor and a United States Deputy Mineral Surveyor in prosecuting surveys in the Territory of New Mexico to such an extent that he has become largely familiar with the topographical features of nearly the whole Territory; that he is acquainted with nearly all of its streams, mountains and plains; that from such period and up to the present time he has made many surveys government and others along the Rio Grande river in the Territory of New Mexico from practically the northern boundary of the Territory to Las Cruces therein; that he has been in the valley of the Rio Grand making such surveys a great many different times and at all seasons of the year; that from the knowledge so obtained by him he is enabled to state definitely and with a full confidence in his own opinion that such river is not now and has never during such period of time been navigable in said Territory; that on many different occasions and different seasons he has crossed the same both in the northern part of the Territory and in the southern part when it was practically dry; that he has observed its flood seasons, the duration and magnitude thereof; that during such flood seasons it is also incapable of navigation, that it is incapable of being beneficially used in such flood seasons even for floating logs, because of the many sand-bars and other obstructions in its channel; that during such flood seasons it spreads out in the valleys through which it flows to considerable width, but that its depth is very shallow, and that sand-bars, continually even

during such floods and almost hourly change and throw its course from one direction to another, and that there is no well defined channel even during flood season that could be used for navigation; that such a thing as a steamboat or raft ascending or descending its channel in New Mexico during flood season is impossible and would be considered absurd by any of the people living along its course.

RICARD L. POWEL.

Subscribed and sworn to before me this twenty-fifth day of June, A. D. eighteen hundred and ninety-seven.

[SEAL]

J. F. POSEY,  
Notary Public.

Territory of New Mexico, } ss.  
County of Grant. }

John M. Ginn, being first duly sworn: on his oath, says: That he has known the Rio Grande river in New Mexico ever since 1870; that during portions of such period that he has lived along its course, particularly at Fort Seldon, in New Mexico, and that he has been during such time familiar with its entire course through the Territory; that in its general character and condition it is the same today as when he first became acquainted with it, that it is a dangerous, treacherous, sand bar, quicksand stream, never has been navigated or capable of navigation during the period affiant has known it, and has, during such entire time, been incapable of navigation, that he has drank the waters of the river, has been swallowed up in its quicksands and has for years gazed at its ugly and tortuous current and been impressed with its ugliness and utter uselessness except for purposes of irrigation; affiant further says that even in its highest floods it is incapable of navigation and that if as stated in the affidavit of Brigadier

General Mills in this case steamboats could ascend for a hundred miles above El Paso that verily, in the opinion of this affiant, they could only do so by the aid of wings.

Further affiant sayeth not.

JOHN M. GINN.

Subscribed and sworn to before me this twenty-fifth day of June, A. D. eighteen hundred and ninety-seven.

[SEAL]

J. F. POSEY,

Notary public.

### EXHIBIT "A"

#### DEPARTMENT OF THE INTERIOR.

GENERAL LAND OFFICE,

WASHINGTON, D. C., Nov. 14th, 1891.

*Register and Receiver, Las Cruces, New Mexico.*

GENTLEMEN:—I enclose herewith copies of selections of lands in your district made the Director of the Geological Survey for permanent sites for irrigating reservoirs under Acts of Congress of October 2, 1888, August 30, 1890, and March 3, 1891. The question of permanently withdrawing these lands from entry or filing is now pending and in order that parties may not be injured by placing improvements upon land which they may be unable to secure title to, you will allow no entries or filings for any of said tracts until further advised.

Acknowledge receipt hereof.

Very respectfully,

[Signed] W. M. STONE,

Assistant Commissioner.

New Mexico.

Reservoir Site No. 38, (Plat No. 38, T. 9, 10 and 11 S. R. 3 W. New Mexico Principal Meridian)

(Recommended to the Secretary of the Interior in letter dated February 27, 1891.)

DESCRIPTION.

On Rio Grande.

Land Segregated.

		T.	S.	R.	3	W.	40	acres
SE $\frac{1}{4}$	NE $\frac{1}{4}$	Sec. 1						
NE $\frac{1}{4}$	SE $\frac{1}{4}$	" 1	" 9	" "	3	"	40	"
SW $\frac{1}{4}$	SE $\frac{1}{4}$	" 1	" 9	" "	3	"	40	"
Lot 5,		" 1	" 9	" "	3	"	35.70	"
SE $\frac{1}{4}$	SW $\frac{1}{4}$	" 1	" 9	" "	3	"	40	"
SE $\frac{1}{4}$	SE $\frac{1}{4}$	" 11	" 9	" "	3	"	40	"
NW $\frac{1}{4}$	NE $\frac{1}{4}$	" 12	" 9	" "	3	"	40	"
Lot 1		" 12	" 9	" "	3	"	24.15	"
Lot 2		" 12	" 9	" "	3	"	37.15	"
E $\frac{1}{2}$ of NW $\frac{1}{4}$		" 12	" 9	" "	3	"	80	"
SW $\frac{1}{4}$		" 12	" 9	" "	3	"	160	"
Lot 4		" 12	" 9	" "	3	"	46.05	"
Lot 3		" 12	" 9	" "	3	"	37.75	"
SW $\frac{1}{4}$	NW $\frac{1}{4}$	" 12	" 9	" "	3	"	40	"
NW $\frac{1}{4}$		" 13	" 9	" "	3	"	160	"
Lot 1		" 13	" 9	" "	3	"	38.10	"
Lot 2		" 13	" 9	" "	3	"	9.05	"
W $\frac{1}{2}$ SW $\frac{1}{4}$		" 13	" 9	" "	3	"	80	"
Lot 3		" 13	" 9	" "	3	"	39	"
Lot 4		" 13	" 9	" "	3	"	26.05	"
E $\frac{1}{2}$ NE $\frac{1}{4}$		" 14	" 9	" "	3	"	80	"
E $\frac{1}{2}$ SE $\frac{1}{4}$		" 14	" 9	" "	3	"	80	"
NE $\frac{1}{4}$		" 23	" 9	" "	3	"	160	"
E $\frac{1}{2}$ SW $\frac{1}{4}$		" 23	" 9	" "	3	"	80	"
N $\frac{1}{2}$ SE $\frac{1}{4}$		" 23	" 9	" "	3	"	80	"
Lot 1		" 23	" 9	" "	3	"	24	"
Lot 2		" 23	" 9	" "	3	"	38.90	"
W $\frac{1}{2}$ NW $\frac{1}{4}$		" 24	" 9	" "	3	"	80	"
Lot 1		" 24	" 9	" "	3	"	14.05	"
Lot 2		" 24	" 9	" "	3	"	15.01	"

	NW $\frac{1}{4}$	SW $\frac{1}{4}$	Sec. 24	T.	9	S.	R.	3	W.	40	acres
Lot 4	"	24	"	9	"	"	3	"	26.35	"	
Lot 3	"	24	"	9	"	"	3	"	14	"	
Lot 1	"	25	"	9	"	"	3	"	9.94	"	
E $\frac{1}{2}$ NW $\frac{1}{4}$	"	26	"	9	"	"	3	"	80	"	
SW $\frac{1}{4}$ NE $\frac{1}{4}$	"	26	"	9	"	"	3	"	40	"	
Lot 1	"	26	"	9	"	"	3	"	35.08	"	
Lot 2	"	26	"	9	"	"	3	"	7.05	"	
W $\frac{1}{2}$ SE $\frac{1}{4}$	"	26	"	9	"	"	3	"	80	"	
Lot 3	"	26	"	9	"	"	3	"	36.07	"	
Lot 4	"	26	"	9	"	"	3	"	30.15	"	
SW $\frac{1}{4}$ NW $\frac{1}{4}$	"	26	"	9	"	"	3	"	40	"	
SW $\frac{1}{4}$	"	26	"	9	"	"	3	"	160	"	
E $\frac{1}{2}$ SE $\frac{1}{4}$	"	27	"	9	"	"	3	"	80	"	
SE $\frac{1}{4}$ SE $\frac{1}{4}$	"	33	"	9	"	"	3	"	40	"	
SW $\frac{1}{4}$	"	34	"	9	"	"	3	"	160	"	
E $\frac{1}{2}$ NE $\frac{1}{4}$	"	34	"	9	"	"	3	"	80	"	
SE $\frac{1}{4}$	"	34	"	9	"	"	3	"	160	"	
W $\frac{1}{2}$ NW $\frac{1}{4}$	"	35	"	9	"	"	3	"	80	"	
NE $\frac{1}{4}$ NW $\frac{1}{4}$	"	35	"	9	"	"	3	"	40	"	
Lot 1	"	35	"	9	"	"	3	"	26.11	"	
Lot 2	"	35	"	9	"	"	3	"	32.30	"	
Lot 3	"	35	"	9	"	"	3	"	6.05	"	
Lot 4	"	35	"	9	"	"	3	"	39.01	"	
Lot 5	"	35	"	9	"	"	3	"	31.05	"	
Lot 1	"	2	"	10	"	"	3	"	2.76	"	
Lot 1	"	3	"	10	"	"	3	"	21.43	"	
Lot 2	"	3	"	10	"	"	3	"	27.97	"	
Lot 3	"	3	"	10	"	"	3	"	39.27	"	
W $\frac{1}{2}$ NW $\frac{1}{4}$	"	3	"	10	"	"	3	"	80	"	
Lot 4	"	3	"	10	"	"	3	"	22.24	"	
Lot 5	"	3	"	10	"	"	3	"	5.97	"	
Lot 6	"	3	"	10	"	"	3	"	31.08	"	
Lot 1	"	4	"	10	"	"	3	"	40.01	"	

Lot 2	Sec.	4	T.	10	S.	R.	3	W.	40.03 acres
Lot 5	"	4	"	10	"	"	3	"	39.06 "
Lot 6	"	4	"	10	"	"	3	"	16.36 "
SE $\frac{1}{4}$ NE $\frac{1}{4}$	"	4	"	10	"	"	3	"	40 "
SE $\frac{1}{4}$ NW $\frac{1}{4}$	"	4	"	10	"	"	3	"	40 "
W $\frac{1}{2}$ SW $\frac{1}{4}$	"	4	"	10	"	"	3	"	80 "
Lot 7	"	4	"	10	"	"	3	"	27.85 "
Lot 8	"	4	"	10	"	"	3	"	19 "
SE $\frac{1}{4}$ SE $\frac{1}{4}$	"	5	"	10	"	"	3	"	40 "
NE $\frac{1}{4}$ NE $\frac{1}{4}$	"	8	"	10	"	"	3	"	40 "
W $\frac{1}{2}$ NW $\frac{1}{4}$	"	9	"	10	"	"	3	"	80 "
W $\frac{1}{2}$ SW $\frac{1}{4}$	"	9	"	10	"	"	3	"	80 "
Lot 1	"	9	"	10	"	"	3	"	34.24 "
Lot 2	"	9	"	10	"	"	3	"	3.04 "
Lot 3	"	9	"	10	"	"	3	"	39.07 "
Lot 4	"	9	"	10	"	"	3	"	33.07 "
Lot 5	"	9	"	10	"	"	3	"	39.09 "
Lot 6	"	9	"	10	"	"	3	"	10.08 "
Lot 7	"	9	"	10	"	"	3	"	1.29 "
Lot 1	"	10	"	10	"	"	3	"	2.36 "
Lot 1	"	15	"	10	"	"	3	"	22.03 "
Lot 2	"	15	"	10	"	"	3	"	22.01 "
Lot 3	"	15	"	10	"	"	3	"	22.18 "
Lot 4	"	15	"	10	"	"	3	"	22.25 "
NW $\frac{1}{4}$	"	16	"	10	"	"	3	"	160 "
SW $\frac{1}{4}$	"	16	"	10	"	"	3	"	160 "
S $\frac{1}{2}$ NE $\frac{1}{4}$	"	16	"	10	"	"	3	"	80 "
N $\frac{1}{2}$ SE $\frac{1}{4}$	"	16	"	10	"	"	3	"	80 "
SE $\frac{1}{4}$ SE $\frac{1}{4}$	"	16	"	10	"	"	3	"	40 "
SW $\frac{1}{4}$ SE $\frac{1}{4}$	"	16	"	10	"	"	3	"	40 "
Lot 2	"	16	"	10	"	"	3	"	36.39 "
Lot 1	"	16	"	10	"	"	3	"	33.37 "
E $\frac{1}{2}$ SE $\frac{1}{4}$	"	17	"	10	"	"	3	"	80 "
NE $\frac{1}{4}$	"	20	"	10	"	"	3	"	160 "

	Sec.	20	T.	10	S.	R.	8	W.	160	acres
E $\frac{1}{2}$ NW $\frac{1}{4}$	"	20	"	10	"	"	8	"	80	"
SW $\frac{1}{4}$ NW $\frac{1}{4}$	"	20	"	10	"	"	8	"	40	"
E $\frac{1}{2}$ SW $\frac{1}{4}$	"	20	"	10	"	"	8	"	80	"
SW $\frac{1}{4}$ SW $\frac{1}{4}$	"	20	"	10	"	"	8	"	40	"
NE $\frac{1}{4}$	"	21	"	10	"	"	8	"	160	"
NW $\frac{1}{4}$	"	21	"	10	"	"	8	"	160	"
SW $\frac{1}{4}$	"	21	"	10	"	"	8	"	160	"
W $\frac{1}{2}$ SE $\frac{1}{4}$	"	21	"	10	"	"	8	"	80	"
NE $\frac{1}{4}$ SE $\frac{1}{4}$	"	21	"	10	"	"	8	"	40	"
NW $\frac{1}{4}$	"	28	"	10	"	"	8	"	160	"
NW $\frac{1}{4}$ NE $\frac{1}{4}$	"	28	"	10	"	"	8	"	40	"
N $\frac{1}{2}$ SW $\frac{1}{4}$	"	28	"	10	"	"	8	"	80	"
NE $\frac{1}{4}$	"	29	"	10	"	"	8	"	160	"
SE $\frac{1}{4}$	"	29	"	10	"	"	8	"	160	"
NW $\frac{1}{4}$	"	29	"	10	"	"	8	"	160	"
NE $\frac{1}{4}$ SW $\frac{1}{4}$	"	29	"	10	"	"	8	"	40	"
S $\frac{1}{2}$ SW $\frac{1}{4}$	"	29	"	10	"	"	8	"	80	"
N $\frac{1}{2}$ NE $\frac{1}{4}$	"	32	"	10	"	"	8	"	80	"
SE $\frac{1}{4}$ NE $\frac{1}{4}$	"	32	"	10	"	"	8	"	40	"
SE $\frac{1}{4}$	"	32	"	10	"	"	8	"	160	"
E $\frac{1}{2}$ NE $\frac{1}{4}$	"	32	"	10	"	"	8	"	80	"
NW $\frac{1}{4}$ NW $\frac{1}{4}$	"	32	"	10	"	"	8	"	40	"
S $\frac{1}{2}$ NE $\frac{1}{4}$	"	5	"	11	"	"	8	"	80	"
Lot 1,	"	5	"	11	"	"	8	"	43.01	"
Lot 2,	"	5	"	11	"	"	8	"	43.03	"
SE $\frac{1}{4}$	"	5	"	11	"	"	8	"	160	"
SE $\frac{1}{4}$ SW $\frac{1}{4}$	"	5	"	11	"	"	8	"	40	"
NE $\frac{1}{4}$	"	7	"	11	"	"	8	"	160	"
N $\frac{1}{2}$ SE $\frac{1}{4}$	"	7	"	11	"	"	8	"	80	"
SW $\frac{1}{4}$ SE $\frac{1}{4}$	"	7	"	11	"	"	8	"	40	"
W $\frac{1}{2}$ NE $\frac{1}{4}$	"	8	"	11	"	"	8	"	80	"
NE $\frac{1}{4}$ NE $\frac{1}{4}$	"	8	"	11	"	"	8	"	40	"
NW $\frac{1}{4}$	"	8	"	11	"	"	8	"	160	"

SE $\frac{1}{4}$ SW $\frac{1}{4}$	Sec. 8	T. 11	S. R.	3	W. 40	acres
W $\frac{1}{2}$ SW $\frac{1}{4}$	" 8	" 11	" "	3	" 80	"
NW $\frac{1}{4}$	" 17	" 11	" "	3	" 160	"

Area Segregated..... 8,507.14 "

### New Mexico.

Reservoir Site No. 39 (Plat No. 39.) Recommended for Segregation in letter dated Feb. 27, 1891. T. 15 S. R. 4 W. and 16 S. R. 4 W.

### New Mexico Principal Meridian.

#### DESCRIPTION.

On Rio Grande.

Lands segregated.

S $\frac{1}{2}$ SE $\frac{1}{4}$	Sec. 5	T. 15	S. R.	4	W. 80	acres
SE $\frac{1}{4}$ SW $\frac{1}{4}$	" 5	" 15	" "	4	" 40	"
S $\frac{1}{2}$	" 8	" 15	" "	4	" 320	"
NE $\frac{1}{4}$	" 8	" 15	" "	4	" 160	"
E $\frac{1}{2}$ NW $\frac{1}{4}$	" 8	" 15	" "	4	" 80	"
SW $\frac{1}{4}$ NW $\frac{1}{4}$	" 8	" 15	" "	4	" 40	"
Entire	" 17	" 15	" "	4	" 640	"
E $\frac{1}{2}$	" 20	" 15	" "	4	" 320	"
NE $\frac{1}{4}$ NW $\frac{1}{4}$	" 20	" 15	" "	4	" 40	"
SE $\frac{1}{4}$ SW $\frac{1}{4}$	" 20	" 15	" "	4	" 40	"
E $\frac{1}{2}$	" 29	" 15	" "	4	" 320	"
S $\frac{1}{2}$ NW $\frac{1}{4}$	" 29	" 15	" "	4	" 80	"
NE $\frac{1}{4}$ NW $\frac{1}{4}$	" 29	" 15	" "	4	" 40	"
SE $\frac{1}{4}$ NE $\frac{1}{4}$	" 30	" 15	" "	4	" 40	"
SE $\frac{1}{4}$	" 30	" 15	" "	4	" 160	"
E $\frac{1}{2}$	" 31	" 15	" "	4	" 320	"
W $\frac{1}{2}$	" 32	" 15	" "	4	" 320	"
W $\frac{1}{2}$ NE $\frac{1}{4}$	" 32	" 15	" "	4	" 80	"
W $\frac{1}{2}$ SE $\frac{1}{4}$	" 32	" 15	" "	4	" 80	"
SE $\frac{1}{4}$ SE $\frac{1}{4}$	" 32	" 15	" "	4	" 40	"

Entire	Sec.	5	T.	16	S.	R.	4	W.	640	acres
E $\frac{1}{2}$	"	6	"	16	"	"	4	"	320	"
SE $\frac{1}{4}$ SW $\frac{1}{4}$	"	6	"	16	"	"	4	"	40	"
E $\frac{1}{2}$	"	7	"	16	"	"	4	"	320	"
E $\frac{1}{2}$ NW $\frac{1}{4}$	"	7	"	16	"	"	4	"	80	"
E $\frac{1}{2}$ SW $\frac{1}{4}$	"	7	"	16	"	"	4	"	80	"
Entire	"	8	"	16	"	"	4	"	640	"
W $\frac{1}{2}$	"	17	"	16	"	"	4	"	320	"
W $\frac{1}{2}$ NE $\frac{1}{4}$	"	17	"	16	"	"	4	"	80	"
W $\frac{1}{2}$ SE $\frac{1}{4}$	"	17	"	16	"	"	4	"	80	"
E $\frac{1}{2}$	"	18	"	16	"	"	4	"	320	"
N $\frac{1}{2}$ NE $\frac{1}{4}$	"	19	"	16	"	"	4	"	80	"
SE $\frac{1}{4}$ NE $\frac{1}{4}$	"	19	"	16	"	"	4	"	40	"
NW $\frac{1}{4}$	"	20	"	16	"	"	4	"	160	"
N $\frac{1}{2}$ SW $\frac{1}{4}$	"	20	"	16	"	"	4	"	80	"

Area segregated..... 6 540 Acres.

5.60 acres were added, see sec. 8 and 17 T 16 S 4 N.

#### New Mexico.

Reservoir Site No. 37 (Plat No. 37.) Recommended for segregated in letter dated Feby. 27, 1891. Township 8 S. range 8 W. New Mexico Principal Meridian.

#### DESCRIPTION.

On Hot Springs Indian Reservation.

Lands segregated.

SW $\frac{1}{4}$ NW $\frac{1}{4}$	Sec.	25	T.	8	S.	R.	8	W.	46	acres
Lot 4	"	25	"	8	"	"	8	"	22.98	"
Lot 3	"	25	"	8	"	"	8	"	22.92	"
S $\frac{1}{2}$ NE $\frac{1}{4}$	"	26	"	8	"	"	8	"	80	"
NW $\frac{1}{4}$ NE $\frac{1}{4}$	"	26	"	8	"	"	8	"	40	"
E $\frac{1}{2}$ NW $\frac{1}{4}$	"	26	"	8	"	"	8	"	80	"
Lot 1.	"	26	"	8	"	"	8	"	22.96	"
Lot 2.	"	26	"	8	"	"	8	"	22.89	"

Area segregated..... 371.78 acres.

**Remainder of reservoir on Hot Springs, Indian Reservation.**

United States Land Office,  
Las Cruces, N. M., June 22, 1897. }

I hereby certify that the foregoing nine pages here-to attached, are a true, correct and complete copy of the original Departmental Letter dated "C" November 14, 1891, now on file in this office.

EDWIN E. SLUDER,  
Register.

**EXHIBIT "B."**

[Copy.]

**DEPARTMENT OF THE INTERIOR.**

WASHINGTON, D. C., August 18, 1894.

*The Commissioner of the General Land Office.*

Sir: In the matter of the selection of the following reservoir sites, the abstracts furnished by your office show that a large part of each is not subject to reservation for the purpose intended, an account of previous dispositions and the attention of the Director of the Geological Survey has been called thereto.

Under date of May 25, 1892, he reports, however, that in the near future, all of these sites will be needed for the storage of waters for public purposes, and that while some of the lands covered by the sites will have to be acquired by condemnation, or other means, before the remaining lands can be used for reservoir purposes, and the future necessities must demand their acquirement in maintaining a proper storage of water, if open to entry under the general land laws.

Under this view, I have to direct that all lands covered by these sites, which are legally subject to reservation, continue withdrawn from disposition to await

further action by Congress in the matter of these reservoir sites.

Proper notations should be made upon your records and the local officers advised accordingly.

The sites referred to are as follows:

**Colorado.**

Reservoir Sites Nos. 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 19, 21, 25, 27, 28, 30, 31, 33, 37, 40, 41, 42, 43, 46, 48, 50, 51, 53 and 55.

**New Mexico:**

Reservoir Sites Nos. 7, 31, 32, 33, 34, 36, 38, and 39.

The papers relating to these sites are herewith returned.

Very respectfully,

**HOKE SMITH,**

Secretary.

"A."

## DEPARTMENT OF THE INTERIOR.

### GENERAL LAND OFFICE.

WASHINGTON, D. C., August 18, 1894.

*The Commissioner of the General Land Office:*

Sir: In the matter of Reservoir Site No. 37 in the Las Cruces land district, New Mexico, selected by the Director of the Geological Survey, it appears that the greater portion of the lands it is desired to reserve, lies within the Hot Springs Indian reservation.

Under date of May 25, 1892, the Director returns the papers relative to said site, accompanied by a statement in which the lands desired to be reserved in said Indian reservation are designated by legal subdivisions of independent sections placed upon said reservation for the purpose of identifying the lands desired to be reserved.

From this date the lands can be clearly identified, and I therefore approve of the selection and direct that all lands legally subject to reservation, covered by said sites, be withdrawn from this position to await further action of Congress in the matter of reservoir sites.

To this end you will make proper notes upon your office records and advise the local officers accordingly.

The papers relating to the site are herewith returned.

Very respectfully,

HOKER SMITH,

Secretary.

"C."

### DEPARTMENT OF THE INTERIOR.

GENERAL LAND OFFICE,

WASHINGTON, D. C. Sept. 26, 1894.

*Registrar and Receiver, Las Cruces, New Mexico:*

GENTLEMEN: By letter "C" of November 14, 1891, "copies of selections of lands in your district, made by the Director of the Geological Survey, for permanent sites for irrigating reservoirs, under Acts of Congress of October 2, 1888, August 30, 1890, and March 3, 1891," were transmitted to your office and you were directed not to allow entries or filings for any of the tracts covered by said selections, until further advised.

By letter August 18, 1894, the Honorable Secretary of the Interior returned the papers in the reservoir site No. 37, embracing lands in Sec. 25 and 26, T. 8 S. R. 8 W., and lands within the Hot Spring Indian reservation, in Tps. 8 and 9 S., R. 7 and 8 W., designated by the Director of the Geological Survey, by "legal subdivisions of independent sections, placed upon said reservation for the purpose of identifying the lands desired to be reserved," with his approval. It is di-

rected by the Honorable Secretary that "all lands legally subject to reservation covered by said site, be withdrawn from disposition, to await the further action of Congress in the matter of reservoir sites."

A copy of said letter of August 18, 1894, is herewith enclosed, and as directed therein, the lands covered by said site No. 37, are continued withdrawn from disposition, and you will be governed accordingly.

Very respectfully,

S. W. LAMOREAU,  
Commissioner.

"A."

#### DEPARTMENT OF THE INTERIOR.

WASHINGTON, D. C., November 8, 1894.

*Register and Receiver, Las Cruces, New Mexico.*

SIRS: Referring to your letter of Oct. 2, 1894, in reply to office letter of Sep. 26, relating to certain reservoir sites, you are advised that those sites were selected by the Director of the Geological Survey, under the act of Aug. 30, 1890, (26 Stat., 371-391, also General Circular, p. 71), and are reserved from entry or settlement until otherwise provided by law. These sites have always been designated by number, and your office has had instructions regarding them in former letters. You will carry out the instructions of office letter of Sep. 26, 1894.

Under Secs. 18 to 21, Act of Mch. 3, 1891, (26 Stat., 1095) corporations, individuals and associations of individuals, filed certain maps and papers, in conformity with the regulations of Feb. 20, 1884, as applications for right of way for canals and reservoirs for irrigation purposes, which are to be noted on the local office records, as required in paragraph 25. These applications are submitted to the Honorable Secretary for his ap-

proval. When they are approved, copies of the map are sent to the local offices and there noted on the records; see paragraph 26, circular Feb. 20, 1894. The public land crossed by such approved rights of way may be disposed of in the usual manner, subject to such rights of way. These are not numbered, and record is kept of them in the usual manner, as of application and correspondence generally, and by the notations required by the circular as above. These rights of way resemble in character and incidents the railroad rights of way, there being but few essential differences.

Very respectfully,

EDWIN A. BOWERS,  
Acting Commissioner.

UNITED STATES LAND OFFICE.

LAS CRUCES, New Mexico, June 22nd, 1897.

I hereby certify that the foregoing copies of letters hereto attached, first, of date of August 18, 1894, from Hoke Smith, Secretary, in reference to reservoir sites in Colorado and New Mexico; second, of same date, from same party, marked A. in reference reservoir site No. 37; third, of date Sep. 26, 1894, from S. W. Lamoreaux, marked "C," in reference to reservoir site No. 37, and fourth, under date of Nov. 8th, 1894, from Edwin A. Bowers, Acting Commissioner, marked F, in answer to office letter Oct. 2nd, 1894, are true and correct copies of the originals now on file in this office.

EDWIN E. SLUDER,  
Register.

EXHIBIT "H-1."

[Copy.]

LAS CRUCES, New Mexico, June 18, 1897.

*To the Honorable Secretary of the Interior, Washington, D. C.*

SIR:—Under and in accordance with a resolution of

instructions of the board of directors of this company made this day, copy of which is hereto attached, application is hereby made for and on behalf of The Rio Grande Dam & Irrigation Company, under the chapter 335, "Entitled an Act to provide for the use and occupation of reservoir sites reserved," for the granting to this company for use as reservoir sites, the land embraced in those certain reservoir sites heretofore surveyed and segregated by the United States Government and designated as "U. S. Reservoir Survey No. 38" and "U. S. Reservoir Survey No. 39," situated in the bed of the Rio Grande and being in the counties of Sierra and of Socorro, respectively, in the Territory of New Mexico, and further designated by the Commissioner of the General Land Office by letter "C," of November 14, 1891, addressed to Register and Receiver, Las Cruces, New Mexico.

Applicant states that inasmuch as the articles of incorporation and other corporate papers are on file in the office of and approved by the Honorable Secretary of the Interior, it does not forward such papers with this application, and inasmuch as the reservoir sites above applied for have already been thoroughly surveyed and segregated by and at the expense of the U. S. Government and the boundaries thereof thoroughly marked and delineated, and inasmuch as this applicant by occupying said sites under said Act so embraced in said chapter 335 will take the same under the restrictions therein contained, applicant has assumed that it is entitled to said reservoir sites without any further survey thereof, but applicant hereby expresses its desire to comply with the rulings of the Honorable Secretary of the Interior concerning such survey under event the Honorable Secretary is of the

opinion that such surveys are necessary, and the applicant hereby expresses its intention of making the same in good faith as required by the Honorable Secretary, and hereby requestes instructions as to any requirements in such matter and the extension to this applicant of a sufficient length of time in which to comply with such requirements.

THE RIO GRANDE DAM & IRRIGATION CO.

[ SEAL ] (Signed) By EDWIN C. ROBERTS.

President.

Attested:

(Signed) W. T. JOHNS.

Territory of New Mexico, }  
County of Doña Ana. }

Edwin C. Roberts, being duly sworn, on his oath, says: That he is the president of the Rio Grande Dam & Irrigation Company organized under the laws of the Territory of New Mexico; that W. T. Johns, whose name is signed above is the secretary of said company and that the seal affixed is the seal of said company; that the reservoir sites named in the above communication were on the 18th day of June, A. D. 1897, at a meeting of the directors of said company, adopted as reservoir of said company, as per a copy of the minutes of said directors' meeting hereto attached, and to be bounded and described as at present bounded and described in the United States Government Survey thereof. And further affiant saith not.

(Signed) EDWIN C. ROBERTS.

Sworn to and subscribed before me this 18th day of June, 1897.

(Signed) EDWIN E. SLUDER,  
Register.

[SEAL.]

Resolved, by the directors of this company, that this company should proceed, in accordance with the privilege extended by the Act of Congress of the United States, approved February 26, 1897, entitled, "An Act to provide for the use and occupation of reservoir sites reserved," same being Chapter 335 of the Acts of 1897, to acquire the land embraced in U. S. Reservoir Sur. No. 38 and U. S. Reservoir Sur. No. 39, lying and being in the bed of the Rio Grande river, in the counties of Sierra and Socorro, in the Territory of New Mexico, and to this end the president of this company, is hereby instructed to file application with the Honorable Secretary of the Interior, therefor, and such reservoir sites so surveyed and segregated and platted on the Government maps are hereby adopted as reservoir sites of this company.

(Signed) W. T. JOHNS,  
Secretary.

**U. S. LAND OFFICE.**

LAS CRUCES, N. M., June 21, 1897.

I hereby certify that the foregoing and hereto attached, is a true, correct and complete copy of application filed June 18, 1897, by The Rio Grande Dam & Irrigation Company, for entry of U. S. Reservoir Sites described as Surveys Nos. 38 and 39.

EDWIN E. SLUDER,  
Register.

**EXHIBIT "G."**

**DEPARTMENT OF STATE.**

**INTERNATIONAL (WATER) BOUNDARY COMMISSION.**

### United States and Mexico.

## Treaties of 1884 and 1889

EL PASO, Texas, November 17, 1896.

*To the Honorable Secretary of State, Washington, D. C.*

Sir: Referring to your letter of August 8th, transmitting copy of a petition addressed to this government by Don Andres Horcasitas, attorney of the inhabitants of Paso del Norte, Mexico, in which he requests the Mexican government to recommend to that of the United States the suspension of all work in the Rio Bravo (Grande) by the Rio Grande Irrigation Company, Limited, and your request for suggestions from me on the subject, I beg to submit herewith my report on the matter.

As stated to you in my last letter of October 29th, I have withheld this report of necessity because the investigations going on by the engineers of the Joint Commission regarding the amount of water taken out by the Americans and the former flow of the river, year by year, had not been completed up to this date, and it was impossible for me to make an intelligent report until they were.

With your permission I called upon the Secretary of the Interior when in Washington and learned what I could about the status of this Rio Grande Irrigation Company, Limited, and found that on February 1, 1895, the Secretary of the Interior—then Mr. Hoke Smith—had approved the application for said company for right of way "subject to any valid interfering rights with the right of way on account of the proposed reservoir." (See copy enclosed, marked "A.") Just what significance this reservation of "valid interfering rights" may have I am unable to understand, but certainly according to common law it should be understood that there should be no interference with any prior appropriation of water below the proposed dam and reservoir.

This proposed dam and reservoir is at a location called Elephant Butte, about 125 miles above El Paso, a distance so great that in this arid climate it is utterly impracticable to carry water to this vicinity, and consequently could be of no benefit to agricultural interests here, notwithstanding the statements in their prospectus that they propose to provide water not only here in Texas but on the Mexican side of the river.

At the same time I learned that this same company had on file applications for two additional dams and reservoirs, one at Rincon, New Mexico, about 100 miles above El Paso, and another at Fort Selden, about 60 miles above.

At the latter place a gentleman by the name of Ernest Dale Owens had also an application on file at the same point as the Rio Grande Land and Irrigation Company, which antedated all the applications of the last mentioned company.

For a full understanding of the status of these three last mentioned applications, I beg to refer to a communication from the Commissioner of the General Land Office to the Secretary of the Interior, dated August 15, 1896, fully discussing their relative merits. (Copy herewith enclosed. marked 'B.' )

The Secretary had when I met him, under consideration, and was about determining the question as to approval or disapproval of these three last applications, but at my verbal suggestion he promised to hold them until my letter to you of October 29th, hereinbefore mentioned, should be referred to him by your department.

The investigations of the engineers of the Joint Commission into the amount of water taken from the Rio Grande and its tributaries in Colorado and New Mexico

since prior to 1880 up to this date, show that prior to 1880 there were in Colorado 511 canals, using 471,000 acre feet, and irrigating 121,000 acres of land. That this number of ditches and amount of land irrigated kept increasing year by year, until at this date there are 925 canals using 556,000 acre feet of water and irrigating 318,000 acres of land.

In New Mexico, there were prior to 1880, 563 canals, using 597,000 acre feet of water and irrigating 183,000 acres of land, and at the present date there are 603 canals, using 388,000 acre feet of water and irrigating 186,000 acres of land.

It will be observed here that the greatest increase in canals and irrigation for the past sixteen years has been in Colorado. As there was prior to 1880, a scarcity of water in the Rio Grande at El Paso and in fact a dry river once in about seven years, it is clear that any increased use of water above El Paso would increase that scarcity. 1879 was the driest year of record prior to 1889. In 1889 the river was dry as far north as Albuquerque; since 1889 the river has been low at El Paso every year but one, namely, 1891, and dry during a large part of several years. The dry river of 1889 lasted longer than any of the others; no water passed El Paso that summer for over four months. The water fell earlier in the spring of 1896 than ever; the flow, which had been small all of the spring, ceasing May 26th, but the copious rains on the New Mexican drainage sent down water in July, and the flow of the river was intermittent after that date. Floods are not so frequent as in former years, the last destructive one occurring in 1884. There was a small flood in 1891, but it was not so large as that of 1884.

The records of the flow of the river for the past 16 years are very meagre, that for 11 months prior to March 31, 1890, was 450,000 acre feet. This includes the long drought of 1889. For the year ending March 31, 1891, the flow was 1,100,000 acre feet; for 1892, 1,850,000 acre feet and for 1893, 875,000 acre feet.

What has been stated above is a very brief extract from the large mass of information and statistics taken by our engineers from which I form the following conclusions.

That the probable flow of water in the river here is likely to be ample for the supply of the proposed international reservoir after deductions are made for all the small reservoirs that are likely to be constructed for the storage in Colorado, and the probable increase of canals in Colorado and New Mexico; but that the flow will not be sufficient to supply the proposed international reservoir here and allow for the supply for the proposed reservoir of The Rio Grande Irrigation Company, Limited, at Elephant Butte, in New Mexico, or any other similar reservoirs in New Mexico, and but one of these schemes can be successfully carried out.

The general results that the Joint Commission are now arriving at concerning the flow of the river, from the investigations of the engineers are: That the flow here at El Paso has been decreased by the appropriation of waters above, in the last 16 years about 1,000 second feet and that the water appropriated by the citizens of Mexico for over forty years past in the valley of El Paso amounted to about 400 second feet and that that appropriated by the citizens of the United States in the same valley for the same length of time amounts to about 350 second feet. All

this of course is approximate, but is as near correct as can possibly be arrived at by any data or evidence now available.

I would therefore suggest that these papers be referred to the Hon. Secretary of the Interior with the request that no further grants for reservoirs be made in New Mexico, and that if practicable, the approval of the reservoir of the Rio Grande Land and Irrigation Company, Limited, at Elephant Butte be canceled or withdrawn, and if not practicable to cancel or withdraw the same, that such executive and legislative restriction be placed upon it as to prohibit it from using any part of the flow of the river to which the inhabitants of either bank of the river below may have a prior right by appropriation, and that some prompt and efficient remedy be provided the possessors of these prior rights by appropriation in case the company should use any water to which the inhabitants above referred to are entitled.

As I understand the matter the irrigation laws are so imperfect and crude at this date, that even in the same state or territory there is no effective legal remedy when water is thus injuriously appropriated, and in separate states it is still more difficult while to the inhabitants of Mexico, it would be impossible to make any successful effort at redress.

I return herewith copy of the protest with attached papers, among which I beg to call attention to the letter of W. E. Baker, dated Las Cruces, N. M., July 12, 1895, who I understand has charge of the land office there, in which letter he states that the only "patent" for the Elephant Butte reservoir of the Rio Grande Dam & Irrigation Company consists of the words "Department of the Interior, Washington D. C. February 1,

1895. Approved subject to any valid existing rights. Hoke Smith, Secretary." This is broader and more comprehensive than the words used in the enclosed letter marked "A," regarding the reservation of rights, and is probably the exact language given to the promoters of the Rio Grande Dam & Irrigation Company, Limited.

ANSON MILLS,

Col. 3d Cav. U. S. A., Commissioner.

**EXHIBIT "G."**

**DEPARTMENT OF STATE.**

WASHINGTON, Nov. 30, 1896.

*The Honorable Secretary of the Interior.*

SIR:—I have the honor to invite your attention to the enclosed copy of a letter dated November 17, 1896, and accompanying papers from Col. Anson Mills, of the U. S. Army, who is a member of a Joint Commission appointed by the U. S. and the Republic of Mexico to report upon the best and most feasible mode—whether by a dam across the Rio Grande river near El Paso, Texas, or otherwise—of so regulating the use of the waters of the Rio Grande river as to secure to each country and its inhabitants their legal and equitable rights and interests in said waters for irrigation purposes.

This examining board was appointed in pursuance of a concurrent resolution of Congress, approved April 29, 1890, which recites the fact that by reason of the irrigating ditches and canals leading from the upper waters of the Rio Grande in the State of Colorado and Territory of New Mexico, an insufficient quantity of water remains in the river to irrigate the lands adjacent to the river after it leaves New Mexico, thereby rendering the lands arid and unproductive to the great detriment of the citizens of both countries who live along the Rio

Grande below the line of New Mexico. The resolution then authorizes the President to enter into negotiations with the government of Mexico with a view to remedy this condition. I enclose a copy of the resolution.

The duty imposed upon this board of examiners was to ascertain:

(1) The amount of water taken from the Rio Grande by the irrigation canals constructed in the United States.

(2.) The average amount of water in said river from year to year before the construction of said irrigation canals and since their construction.

(3.) The best and most practicable mode of regulating the use of the waters of the Rio Grande so as to secure to each country and to the land owners on both sides of the river their legal and equitable rights and interests in said waters.

August 4th last, the Mexican Minister to the United States transmitted to this department a copy of a petition forwarded by the inhabitants of the city of Paso del Norte, Mexico, calling attention to the distressing situation in the towns on the Mexican side of the Rio Grande caused by the immoderate use of the waters of the river for irrigation purposes by the adjacent owners in the United States above the boundary line. This petition states that the efforts of the two governments to remedy this condition will be fruitless if, in addition to the 40 dams already existing in Colorado, the Rio Grande Irrigation and Land Company, Limited, should be permitted to construct, as it proposes, a dam across the Rio Grande at Elephant Butte in New Mexico. The Mexican Minister said that his government regarded this petition as well founded, and requested the United

States to adopt such measures as may be in its power to put a stop to the works undertaken by the Rio Grande Irrigation and Land Company, Limited, until the effect of that company's proposed works upon the practicability of the international scheme could be considered by the examining board and determined upon to the satisfaction of the two governments. A copy of the Mexican petition was sent to Col. Mills for his suggestions. The enclosed letter of Novemuer 17, 1896, to which your attention is invited, is his reply.

Col. Mills says that the proposed dam and reservoir of the Rio Grande Irrigation and Land Company is located about 125 miles above El Paso, and that it will be useless, at that distance, to furnish water for irrigation in the vicinity of El Paso and below. He says furthermore that he is informed that the same company has dams and reservoirs, one at Rincon, New Mexico, about 100 miles above El Paso, and another at Fort Seldon, about 60 miles above; also that at the latter place a man named Ernest Dale Owen has applied for permission to erect a dam and reservoir.

It is understood that the Rio Grande Irrigation and Land Company, Limited, acquired its right to build the reservoir it is now constructing, from a corporation existing under the laws of New Mexico under the name of the "Rio Grande Dam and Irrigation Company," to which company the right of way for the construction of the storage dam at Elephant Butte was granted by the Secretary of the Interior, February 1, 1895, under the provisions of the Act of March 3, 1891.

Col. Mills gives it as his opinion that the probable flow of water in the river will be sufficient to supply the proposed international reservoir after deducting for all the small reservoirs now in operation and likely to

be constructed above, but that the flow will not be sufficient to supply the proposed international reservoir and allow for the supply of the proposed reservoir of the Rio Grande Irrigation and Land Company, Limited, at Elephant Butte, or any other reservoirs upon the same scale, and that the scheme to build an international reservoir will have to be abandoned unless the completion of the works proposed by the Rio Grande Irrigation and Land Company, Limited, and by Owen, is prevented. Col. Mills' letter suggests that the rights obtained from the United States by the Rio Grande Irrigation and Land Company, Limited, may be subject to conditions in favor of the rights of those who live below, which on a proper showing might enable the Secretary of the Interior to cancel the grant made to that company. The other applications for permission to build reservoirs for storage of the waters of the Rio Grande mentioned by Col. Mills have not, it is assumed, yet been finally acted upon.

The circumstances being as above stated, I desire to suggest the propriety of declining to grant any additional rights to build dams and reservoirs as applied for—certainly until the negotiations now pending between Mexico and the United States have reached a final conclusion. I desire also to suggest that an investigation may be made of the rights granted to the Rio Grande Irrigation and Land Company, Limited, or any acts or proceedings done by that company by virtue of such rights, with a view to ascertaining whether there is any legal power to cancel those rights, and, if the power exists, whether it can be exercised without injustice to the parties directly and indirectly interested in that enterprise.

With a request for your earliest practicable attention  
to this matter,

I have the honor to be, Sir,

Your obedient servant,

RICHARD OLNEY.

**EXHIBIT "F."**

**DEPARTMENT OF STATE.**

WASHINGTON, January 11, 1897.

*The Hon. Secretary of the Interior.*

SIR: In your letter of December 19, 1896, relative to the reservoir which the Rio Grande Dam & Irrigation Company, or another corporation claiming the rights of that company, intends to build at Elephant Butte, New Mexico, you informed me that you had, in compliance with my suggestions of November 30, 1896, directed the Commissioner of the General Land Office to suspend action on any and all applications for right of way through public lands for the purpose of irrigation by using the waters of the Rio Grande river or any of its tributaries in the State of Colorado or in the Territory of New Mexico until further instructions from you. The request of this Department, upon which your order was based, was made at the suggestion of Col. Anson Mills, a copy of whose letter, dated October 29, 1896, was transmitted to you October 31 of that year.

(Here the Secretary suggests modification of said order of suspension in so far as it applies to Pecos River.)

There is another phase of this question, which it has occurred to me may have an important bearing upon the rights of parties now applying for permission to erect dams across the Rio Grande, and also upon the international question involved. I have information

which indicates that the Rio Grande river in some parts above the international boundary line is and has been used as a waterway for navigation between the United States and Mexico, and possibly between the State of Colorado and the Territory of New Mexico. If it be true that this stream in its natural condition is capable of use for the transportation of commerce between two States of the Union, or between the United States and a foreign country, the river is a navigable water of the United States, and as such, subject to the laws of Congress enacted for the maintenance, protection and preservation of the navigable waters of the United States. One of the principal matters of complaint by Mexico, is that the diversion of the upper waters of the Rio Grande for irrigation purposes, has affected the usefulness of that stream as a waterway for commerce.

The Attorney General in his opinion of December 12, 1895, (21 Op. 274) held that the river was not navigable above the boundary, in the sense of the treaty between the United States and Mexico; but the question here is, whether it is navigable within the meaning of the laws of the United States. The condition of navigability within the meaning of our statutes, are well defined in the decisions of Federal courts. Many of these are referred to in 20 Op. 101.

If the Rio Grande river is in the part under consideration, a navigable water of the United States, the question arises, whether the erection of the proposed dam across it, will not interfere with its navigability, and bring these dams within the prohibition of the statute, enacted for the preservation of navigable waters. I refer particularly, to the Act of September 19, 1890, Secs. 7 and 10, (26 Stat. 426) and to the Act of July 13, 1892, Sec. 3, (27 Stat. 110). It is true

that the enforcement of these statutes devolves primarily upon the Secretary of War, and that at first view, it may not appear to be a part of the duty of the Secretary of the Interior, to take care of the navigability of the streams on the public lands; but in a case where the act of the Secretary of the Interior approving the right of way to build a dam across the river on the public lands may operate, as it must if the river is a navigable water of the United States, as a grant of Executive sanction to a proceeding which is in violation of law, it would seem to be the duty and within the jurisdiction of the Secretary of the Interior to ascertain before sanctioning the erection of the dam, whether it would constitute an obstruction to a navigable water of the United States and be within the prohibition of the statutes.

As the erection of the dams under consideration is now the subject-matter of a complaint of the government of Mexico, I feel it my duty to lay this question before you in order that you may determine in the first place whether you have the power, and in the second place whether it is a part of your duty to withhold approval of the pending applications for right of way to build dams across the Rio Grande river and its tributaries above the boundary line until the applicants have satisfied you that the river in the part affected by these dams, is not a navigable water of the United States, or that the dams will not interfere with the navigation of the river. It must be observed that the obstruction to navigation may result not only from the intervention of the dam across the river, but also from the diversion of the waters, leaving an insufficient quantity below the dam for the purposes of navigation.

I have the honor to be,

Your obedient servant,

RICHARD OLNEY.

United States of America,  
Territory of New Mexico,  
3d Judicial Dist. Court.

Be it remembered, that on the 24th day of May, A. D. 1897, there was entered of record in the United States District Court of the Third Judicial District of the Territory of New Mexico, an order, which said order is in words and figures as follows to-wit:

United States of America,  
No. 140. vs.  
The Rio Grande Dam & Irrigation Company.

Upon the filing and reading of the bill of complaint in the foregoing cause, it is ordered that a temporary writ of injunction issue against the defendant, The Rio Grande Dam & Irrigation Company, as prayed for in said bill, and it is further ordered that said defendant show cause, if any it have, before me in chambers, on Monday the 14th day of June, 1897, why said injunction should not be continued in force until the final hearing of the cause or should be dissolved.

Done in chambers this 24th day of May, A. D. 1897.

GIDEON D. BANTZ,  
Judge, etc.

And be it further remembered that afterwards, to-wit: on the 25th day of June, A. D. 1897, in the said United States District Court, the following proceedings were had and entered of record, to-wit:

In the United States District Court of the Third Judicial District of the Territory of New Mexico—In Vacation—At Chambers. Present:

GIDEON D. BANTZ,  
Judge and Chancellor.

W. B. CHILDERS, Esq.,  
United States Attorney.

W. B. WALTON.  
Clerk.

United States of America  
 No. 140.      vs.  
 The Rio Grande Dam & Irriga- }  
 tion Company, et al.      Chancery.

Comes now the United States of America, by W. B. Childers, Esq., its district attorney, and with him by courtesy appearing T. A. Falvey, Esq., and W. B. Brack, Esq., in aid of the said district attorney.

And now comes W. A. Hawkins, Esq., Albert B. Fall, Esq., and S. B. Newcomb, Esq., and enter their appearance as solicitors for the respondents herein.

And now this cause coming on to be heard upon the order to show cause why the temporary injunction heretofore granted herein should not be continued in force, heretofore made and entered of record in this cause, and respondents' motion to dissolve said injunction, heretofore filed herein, and the court having heard arguments of counsel, and this hearing not being concluded, it is continued until to-morrow morning at nine o'clock.

Now the court appoints H. B. Holt as special stenographer to the court for the hearing of this cause, and he is duly sworn to well and truly serve as such.

It is ordered that hearing adjourn until to-morrow morning at nine o'clock.

And be it further remembered that afterwards, to-wit: on the 26th day of June, A. D. 1897, in the said United States District Court, the following proceedings were had and entered of record, to-wit:

Hearing resumed pursuant to adjournment, present and presiding as of yesterday.

United States of America  
 No. 140.      vs.  
 The Rio Grande Dam & Irriga- }  
 tion Company, et al.      Chancery.

And now this cause coming on further to be heard upon the order to show cause why the temporary injunction heretofore granted herein should not be continued in force, made and entered of record in this cause, and respondents' motion to dissolve said injunction heretofore filed herein, and the court having heard arguments of counsel, and this hearing not being concluded, it is continued until Monday morning at nine o'clock.

It is ordered that hearing adjourn until Monday morning at nine o'clock.

And be it further remembered that afterwards, to-wit: on the 28th day of June, A. D. 1897, in the said United States District Court, the following proceedings were had and entered of record, to-wit:

Hearing resumed pursuant to adjournment, present and presiding as of Saturday.

United States of America,  
No. 140.      vs.  
The Rio Grande Dam & Irrigation Company, et al.      } Chancery.

And now this cause coming on further to be heard upon the order to show cause why the temporary injunction heretofore granted herein should not be continued in force, made and entered of record in this cause, and respondents' motion to dissolve said injunction, heretofore filed herein, and the court having heard arguments of counsel, and this hearing not being concluded, it is continued until to-morrow morning at nine o'clock.

It is ordered that hearing adjourn until to-morrow morning at nine o'clock.

And be it further remembered that afterwards, to-wit: on the 29th day of June, A. D. 1897, in the said United

States District Court, the following proceedings were had and entered of record, to-wit:

Hearing resumed pursuant to adjournment, present and presiding as of yesterday.

United States of America,  
No. 140. vs.  
The Rio Grande Dam & Irrigation Company, et al. } Chancery.

And now this cause coming on further to be heard upon the order to show cause why the temporary injunction heretofore granted herein should not be continued in force, made and entered of record in this cause, and respondents' motion to dissolve said injunction, heretofore filed herein, and the court having heard all the arguments of counsel, and this hearing being concluded, the court doth reserve his decision herein until a future date.

And be it further remembered that afterwards, to-wit: on the 3rd day of July, A. D. 1897, there was entered of record, in the said United States District Court, an order which said order is in words and figures as follows, to-wit:

In the District Court of the Third Judicial District of the Territory of New Mexico—In Vacation—At Chambers,

United States of America,  
No. 140. vs.  
The Rio Grande Dam & Irrigation Company, et al. } Chancery.

And now this cause coming on further to be heard on the order to show cause, why the temporary injunction heretofore granted herein, should not be continued in force, made and entered of record in this cause, and the motion to dissolve said injunction heretofore filed herein, and the court having heretofore heard all the

arguments of counsel, and being fully advised in the premises, doth sustain said motion.

It is therefore ordered by the court, that the motion to dissolve the injunction, heretofore filed by respondents in this cause, be and the same is hereby sustained, and that the injunction heretofore granted herein, be and the same is hereby dissolved.

GIDEON D. BANTZ.  
Judge and Chancellor.

And be it further remembered that afterwards, to-wit: on the 31st day of July, A. D., 1897, there was entered of record in the said United States District Court, an order, which said order is in words and figures as follows, to-wit:

In the District Court of the Third Judicial District of the Territory of New Mexico, sitting for the trial of causes arising under the Constitution and laws of the United States.

United States of America,	}
Complainant,	
No. 140.      vs.	
Rio Grande Dam & Irrigation Company, et. al.,	}
Defendants.	

ORDER.

It is ordered by the court that the complainant, the United States of America, be and it is hereby permitted to file and make a part of the record in said cause, and that the same be considered as part thereof for the purpose of the hearing upon the rule heretofore made upon the defendant, The Rio Grande Dam & Irrigation Company, upon the filing of the original bill in this cause, to show cause why an injunction theretofore issued, should not be issued, the articles of incor-

poration of the said Rio Grande Dam & Irrigation Company and a copy of an indenture of lease executed by and between the said Rio Grande Dam & Irrigation Company and its co-defendant, The Rio Grande Dam, Irrigation and Land Company, Limited, and the said exhibits when so filed be considered and taken as a part of the record considered by the court upon the hearing of said rule upon said injunction, and that said exhibits be considered as filed *nunc pro tunc* of date the 25th day of June, A. D. 1897.

GIDEON D. BANTZ,  
Judge.

And be it further remembered that afterwards, to-wit: on the 31st day of July, A. D., 1897, there was entered of record in the said United States District Court, an order which said order is in words and figures as follows, to-wit:

In the District Court of the Third Judicial District of the Territory of New Mexico, sitting for the trial of causes arising under the Constitution and laws of the United States.

United States of America, Complainant.  No. 140.      vs. Rio Grande Dam and Irrigation Company, et als.	}
Defendants.	

ORDER.

And now this cause coming on to be heard, the United States of America appearing by its attorney for the Territory of New Mexico, W. B. Childers, Esq., and with him appearing, by courtesy, T. A. Falvey and W. B. Brack, Esq., of El Paso, Texas, and the defendant, The Rio Grande Dam & Irrigation Company and The Rio Grande Irrigation and Land Company, Lim-

ited, by their solicitors, W. A. Hawkins, S. B. Newcomb and A. B. Fall, Esqrs., under the rule heretofore made upon the defendant, Rio Grande Dam and Irrigation Company, to show cause, if any it had, why the injunction, heretofore granted, restraining it from maintaining and erecting a dam in the Rio Grande river at a point called Elephant Butte, fully described in the original and amended bills, filed herein and in said order, should not be continued; and the said complainant, the United States of America, having filed an amended bill in said cause, making the Rio Grande Irrigation and Land Company, Limited, a party thereunder, and the said defendant, in answer to said amended bill, having filed a special plea in bar and having also answered said amended bill and also filed a motion to dissolve the injunction and to dismiss the original and amended bills so filed by complainant herein, and the complainant thereupon having filed its motion to set down defendants' pleas for argument as to their sufficiency as defense to said suit as a matter of law, and the court having heard the arguments of counsel and having heard read the affidavits, extracts from geological reports, agricultural reports, reports of engineers and of the Secretary of War, histories and other sources of information, and having had submitted to it, official map of the Territory of New Mexico and of the United States of America, showing the source, trend, course and mouth of the Rio Grande river in New Mexico and throughout the United States and being fully advised thereby, doth take judicial notice of the fact and doth thereby determine that the Rio Grande river is not navigable within the Territory of New Mexico, and doth find as a matter of law that said amended bill does not state a case entitling

the complainant to the relief asked for in the prayer of said amended bill and that the same is without equity and the complainant having further declined to amend said bill:

The court doth order, adjudged and decree, that the said injunction, heretofore issued, herein be dissolved and that said cause be, and the same hereby is dismissed, and that the defendants have and recover their reasonable costs herein to be taxed against complainant.

And upon the complainant, the United States, in said cause praying an appeal from the order of the court, dismissing said cause, it is ordered that said appeal be and the same hereby is granted as prayed.

GIDEON D. BANTZ,  
Judge and Chancellor.

Done at Chambers, this the 30th day of July, A. D., 1897.

United States of America, Territory of New Mexico,  
Third Judicial District Court.

I, W. B. Walton, clerk of the United States District Court of the Territory of New Mexico, do hereby certify that the above and foregoing is a true and correct copy of all the record entries in cause number 140 on the docket of said court, wherein the United States of America is complainant and The Rio Grande Dam & Irrigation Company, et. al., are defendants, as the same appear of record in my office.

[SEAL.]

Witness my hand and the seal of  
said court, at Silver City, New  
Mexico, this twelfth day of  
August, A. D., 1897.

W. B. WALTON,  
Clerk.

In the District Court, Third Judicial District.

United States of America,  
No. 140.      vs.  
The Rio Grande Dam & Irrigation Company, et al.      } Injunction.

**SYLLABUS OF OPINION.**

(1.) Under the treaties with Mexico each Republic reserves all right within its own territorial limits. This would have been so upon principles of international law without such reservation. States lying wholly within the United States belong exclusively to it, and the soil within the United States is not burdened with a servitude in favor of Mexico, in respect to any duty to so discharge the water as to promote or preserve the navigability of the Rio Grande.

(2.) It is not the capacity of a stream to float a log or a row boat which renders it a navigable river within the Acts of Congress (1890 and 1892) but whether, at regular periods of sufficient duration and in its regular condition, its capacity is such as to be susceptible of beneficial use as a public highway for commerce. The Rio Grande in New Mexico is not a navigable river.

(3.) The power to control and regulate the use of waters not navigable, exercised by states and territories in the arid west, was confirmed by Congress by the Act of 1866, and that power now resides wholly in such states and territories under the Act of 1877 and subsequently, therefore the diversion of such local waters is not a violation of any Act of Congress even though the navigable capacity at a distance below may become thereby impaired.

United States of America  
No. 140.      vs.  
The Rio Grande Dam & Irrigation Company, et al.      } Injunction.

**OPINION OF THE COURT.**

The issues briefly stated are these:

The amended bill charges that the defendant is, (1) about to obstruct the Rio Grande, a navigable river, and, (2) obstruct the flow of waters and interfere with the navigable capacity of a river. That such obstructions would be in violation of the Acts of Congress of 1890 and 1892, and contrary to the treaty with Mexico.

A preliminary injunction was granted, and the defendant ordered to show cause why it should not be continued. The defendant filed its answer denying that the Rio Grande is a navigable river; and also filed special pleas justifying under right of way, for reservoir and canals secured under the Acts of 1891, and certain Territorial laws.

The issues arise on the motion to dissolve the injunction and upon the sufficiency of the special pleas.

It may be stated at the outset, that this is not a contest between private persons as to superior right by prior appropriation. When that question arises the courts will doubtless be entirely competent to deal with it.

The Rio Grande from El Paso to the Gulf of Mexico is the boundary line between Mexico and the United States, and under treaty between those Republics, the Rio Grande along such boundary is made free and common to the vessels and citizens of both countries. There is no guaranty by either Republic that the Rio Grande is or will continue to be navigable, but each party stipulated that it would not construct any work "below the intersection of the 31 degree, 47 min. 30 sec. parallel of latitude with the boundary line" which may impede or interrupt in whole or in part the exercise of the free

and common use of the river. Neither Mexico nor the United States surrendered any proprietary right to the adjacent soil or to any incident thereof. Indeed it is expressly stipulated that the treaty shall not "impare the territorial rights of either Republic within its established limits."

The legal effect would have been the same had the reserving clause been omitted, as under the proper rule of construction the free and unobstructed passage is ceded without prejudice to other territorial rights. The continued enjoyment of other proprietary rights must be presumed unless expressly renounced. Vattel Law Nations Sec. 273.

The territory of the United States includes the lakes, seas and rivers lying within its limits; hence rivers flowing through it, form part of its domain and cannot be considered as free to other countries any more than the adjacent lands.

An exception to this general rule has been sometimes claimed where the river flows from one state through the territory of another, in favor of the right of passage to and from the inland state for commercial and other peaceful purposes. While this exception has been sometimes contested (ex. gr. by Spain over the Mississippi, Great Britain over the St. Lawrence, Holland over the Scheldt) it is at best regarded as an imperfect right subservient to the convenience and safety of the state affected. Wheaton International Law, 188-205; Polson Law Nations, 30.

It therefore seems clear that there is no duty created by international law or by treaty, which requires that the waters collected along the Rio Grande and lying wholly within the United States shall be so discharged as to aid in the navigation of the Rio

Grande along the Mexican boundary; and the diversion of waters lying wholly within the United States, is not a violation of any treaty rights secured to Mexico. If it were otherwise, the secondary and dependent right of navigation, would absorb the superior and primary territorial rights of the United States over its own domain, and subject lands wholly within the limits of this Republic, to the burdens of a servitude not expressed in the treaty, or implied from any reasonable interpretation of its language.

This brings us to a consideration of the question, as to whether the Rio Grande is a navigable river in New Mexico, and at the point known as Elephant Butte, within the meaning of the Acts of Congress of 1890 and 1892.

Counsel on each side of this case, concede that the court takes judicial notice of what are navigable rivers; but for the enlightenment of the court in this matter, a great mass of documentary information has been submitted in the shape of maps, reports of exploring and surveying expeditions made under the War and Interior Departments of the Government, and also reports of officers, specially detailed to investigate the feasibility of utilizing the river for navigation, and its capabilities for reservoirs and irrigation.

It will be observed, that in the original bill it was not charged, that the Rio Grande is a navigable river above El Paso, but charged that the river is navigable below El Paso, and that defendants' proposed dam (125 miles above) will destroy the river as a stream, diminish the volume of water below, and materially affect its navigability. The amended bill charges that the river is navigable, up as far as Roma, a short distance above the gulf of Mexico, and is susceptible of

navigation and has been navigated from Roma, to a point 150 miles below El Paso, (Presidio del Norte) where the falls and rapids interrupt navigation, and that the river above the falls, is susceptible of navigation up to La Joya, above Elephant Butte; the bill closes this part with an allegation that the river is navigable and susceptible of being navigated as aforesaid, for carrying on commerce between the Territory of New Mexico, the State of Texas and the Republic of Mexico.

The course of the Rio Grande in New Mexico is through rocky cañons and sandy valleys; in the valleys it spreads out, shallow and between low banks; over fine, light, sandy soil of great depth; bars are continually forming, passing away and reforming, and the quicksands in the bed of the stream and along its margin are perilous to life. The fall is from four to fifty-two feet to the mile and the changes in its course are rapid, continual and often radical; the valley is scarred with low ravines made by its progress in different places. In all the period of time only two instances were shown where the river was actually utilized for the conveyance of merchandise, and these were of timbers; one of these instances occurred in 1858 or 1859 when a raft was sent down from Canutillo to El Paso, a distance of 12 miles; and the other recently when some telegraph poles were floated from La Joya a "short distance." "The water of the stream, especially in central and southern New Mexico, is heavily loaded with silt. The channel of the river through these valleys is usually choked with sand and in times of low water the stream divided into a number of minor channels; and apparently a large percentage of the water is lost in these great deposits of fine material" (12 Annual Rept. Geol. Sur. 204.)

"From Bernalillo (N. M.) to Fort Hancock (Tex.) the Rio Grande is in the highest degree spasmodic, with immense floods during a few weeks of the year and a small stream during the remainder of it." (10 Annual Rept. Geol. Sur. P. 99.) "From personal observation, I know that these seasons of flood and drouth (in Rio Grande) were of about the same character 30 years ago." (Maj. Anson Mills 10 U. S. Cav. Rept. Spec. Com. Sen. Vols. 3 and 4 P. 39). But what is of more importance, we have reports of officials upon the exploration of the river made under the direction of the Government for the special purpose of considering its navigability. From these it appears: "The stream is not now navigable, and it cannot be made so by open channel improvement. An accurate survey and hydrometric observations would be necessary to determine positively whether an improvement by locks and dams could be made or not, but the heavy fall of the river, the lowness of its banks and the small discharge, do not encourage the belief that such improvement would be financially, even if physically, practicable. Certainly there is no public interest which would justify the expenditure of the many millions of dollars which such an improvement would involve. The irrigation of the valley is a matter in which the inhabitants are now deeply interested, while the possible navigation of the river receives little or no attention from them. \* \* \* In my judgment the stream is not worthy of improvement by the General Government." (Report of O. H. Ernst, major of engineers, to Secretary of War, 1889.) Again: "I consider the construction, not only of an open river channel, but of any navigable channel, to be impracticable. \* \* \* During the greater part of the year,

when the river is low, the discharge would be insufficient to supply any navigable channel, except perhaps a narrow canal with locks, the construction of which on a foundation of sand, in places forty feet deep, would be financially, if not physically, impracticable." (Report of Gerald Bagnall, assistant engineer, to Secretary of War, 1889.)

The navigability of a river does not depend upon its susceptibility of being so improved by high engineering skill and the expenditures of vast sums of money, but upon its natural present conditions. In Daniel Ball, 10 Wallace, 557, the Supreme court says: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact, and they are navigable in fact when they are used or are susceptible of being used in the ordinary condition, as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water." In the Montillo, 20 Wallace, 431, the court says: "If it be capable in its natural state of being used for purposes of commerce, no matter in what mode that commerce may be conducted, it is navigable in fact and becomes a public river or highway \* \* \* the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce." The court approves the language of Chief Justice Shaw in 21 Pickering 344, who said: "In order to give it the character of a navigable stream it must be generally and commonly useful to some trade or agriculture." See also Morrison vs. Coleman (Ala.) 3 L. R. A. 334. Of course it need not be perennially navigable, but the seasons of navigability must occur regularly and be of sufficient duration and character to subserve a useful

public purpose for commercial intercourse. While the capacity of a stream for floating log or even thin boards may be considered, yet the essential quality is that the capacity should be such as to subserve a useful public purpose. *Angell Water Courses* 335. In a recent case the Supreme court of Oregon says, per Thayer, C. J.: "Whether the creek in question is navigable or not for the purposes for which appellant used it, depends upon its capacity in a natural state to float logs and timber, and whether its use for that purpose will be an advantage to the public. If its location is such and its length and capacity so limited that it will only accomodate but a few persons, it cannot be considered a navigable stream for any purpose. It must be so situated, and have such length and capacity, as will enable it to accommodate the public generally as a means of transportation." And in the same case Lord J. said: "It must be susceptible of beneficial use to the public" be "capable of such floatage as is of practical utility and benefit to the public as a highway." And of the stream then in question he says: "It is not only not adapted to public use, but the public have made no attempt to use it for any purpose." *Haines vs. Hall* (Oregon) 3 L. R. A. 609. The Supreme court of Alabama says: "In determining the character of a stream, inquiry should be made as to the following points: Whether it be fitted for valuable floatage; whether the public or only a few individuals are interested in transportation; whether any great public interests are involved in the use of it for transportation; whether the periods of its capacity for floatage are sufficieutly long to make it susceptible of use, beneficially to the public." *Roads vs. Otis* 33, Ala. 578; *Peters vs. N. O. M. & C. R. Co.*, 56, Ala.

523. Indeed in the letter of inquiry by the Honorable Richard Olney, Secretary of State, in respect to the facts, as to the navigability of the Rio Grande, in interstate commerce among other essential qualities, he says: "It should be remembered, that a mere capacity to float a log or a boat, will not alone make a river navigable. The question is, whether the river can be used profitably for merchandise. I have been informed, that wood is sometimes brought down the river to Ciudad Juarez, in flat boats, and that logs are rafted or floated down from the timbered lands on the upper river, for commercial purposes." (Letter January 4, 1897.) The Secretary of State seems to have been misinformed, as to such use for commerce. This letter was addressed to Col. Anson Mills, at whose request, it appears that applications for right-of-way for irrigation, by the use of waters of the Rio Grande, and all its tributaries were suspended throughout New Mexico and Colorado. The answer of Col. Mills deals almost wholly with the river internationally, the river in its relation to interstate commerce is dismissed by him, with an instance of the floating of a raft of logs in 1859, from a point 18 miles above El Paso, and the qualifying remark "it would now hardly be practicable to do so." (Letter January 7, 1897.)

The fact that dams have been erected across the river at El Paso and other places, from the earliest times, and the fact that no use has been made of the stream for navigation or floatage, are facts which though they do not in themselves determine its susceptibility of navigation, are nevertheless entitled to great weight. They are facts clearly indicating the common judgment and knowledge of the people, who have had the longest and most intimate acquaintance with the capabilities of

the river, a knowledge founded on their own experience and that of their ancestors.

The Rio Grande is not a navigable river in New Mexico.

The next point is that, even though the Rio Grande be not navigable in New Mexico, still the contemplated obstruction will diminish the waters and thereby impair the navigability of the river at points several hundred miles below, near its mouth at the Gulf and that therefore it is an obstruction within the meaning of the Act of 1890. Counsel for defendant raise the point that the undisputed fact is, that a dam has been maintained for near two hundred years across the river at El Paso by which the waters of the Rio Grande are diverted into irrigating ditches in the City of El Paso and upon Mexican soil; and that in a proceeding in equity a chancellor cannot close his eyes to the fact that apparently some other purpose than navigation is the real object of this proceeding. If, however, the threatened act of the defendant be illegal, I cannot agree that the Government becomes powerless to resist it, merely because others are engaged in like enterprises.

We will therefore consider the question whether the contemplated obstruction at Elephant Butte will be an illegal interference with the navigability of the river several hundred miles below toward the gulf. The Act of 1890 (1 Sup. R. S., p. 803) prohibits the creation of obstructions "not affirmatively authorized by law" to the "navigable capacity" of any waters of the United States. Its terms are more comprehensive than the Act of July 13th, 1893, prohibiting the erections of dams, etc., etc., in any navigable river without the permission of the Secretary of War. It is con-

tended that under the Act of 1890 an obstruction, no matter where placed, is unlawful which diverts waters from flowing into a navigable river and thereby affects the navigable capacity of such a river. But a careful reading of the act will not, I think, sustain the contention. The Act applies only to obstructions to waters of which the United States has jurisdiction, and then only to the navigable capacity of such waters. The language is, "The creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters in respect of which the United States has jurisdiction, is hereby prohibited." Waters which are not navigable are local and subject to local laws. The jurisdiction of Congress over waters arises from the power to regulate commerce between the states and foreign nations. *Veazie vs. Moor*, 14 How. 568. *Gould Waters*, 34. Unless therefore the stream is navigable and a means of communication between the states and foreign nations, Congress is utterly without jurisdiction over it, except in respect of its riparian rights arising from the ownership of the soil through which such waters run.

We might close the opinion at this point, but the important interests and questions involved in this cause perhaps require a more extended consideration.

The riparian rights of the United States were surrendered in 1866 (R. S. 2339); prior to that time it had become established that the common law doctrine of riparian rights was unfitted to the conditions in the far west, and new rules had grown up under local legislation and customs more nearly analogous to the civil law. Recognizing that the public domain could not be utilized for agriculture and mining purposes without the use of water applied by artificial means, and that

vast interests had grown up under the presumed license of the Federal Government to the use of such waters, Congress confirmed the rights of prior appropriation of waters by the Act above mentioned, where the same "are recognized and acknowledge by the local customs, laws and decisions of the courts." (Sec. 2339) The Supreme court of the United States in passing upon this Act observes, "it is evident that Congress intended, although the language used is not happy, to recognize as valid the customary law with respect to the use of the water which had grown up among the occupants of the public lands under the peculiar necessities of their condition." Atchison vs. Peterson, 20 Wal. 507; Basey vs. Gallagher, 20 Wal. 671. And since 1870 patents for lands expressly except vested water rights.

Of course Congress may resume its control, but there can be no presumption of an intent to take them out of local control and resume regulative power from doubtful expression. Repeals by implication are not so favored. Congress could undoubtedly preserve navigable streams by legislating against the use of their confluence. But that power could not be exercised against those private rights which have become vested, unless under the power of eminent domain compensation be paid therefor.

Instead of an intention to resume such control Congress has manifested a purpose to extend the largest liberty of use of waters in the reclamation of the arid region, and under local regulative control. Following in line with the Act of 1866 the Act of 1877 authorize the entry of desert lands in the arid region by those who intend to reclaim them by conducting water upon them. This act again distinctly recognized the validity

of the right of prior appropriation and also provided that "All surplus water over and above such actual appropriation and use together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights." This act was limited to States and Territories in the arid region (1 Sup. R. S. P. 137). Colorado was included in 1891 (1 Sup. R. S. 249-41). By the Act of 1888 (an appropriation bill) an investigation was directed as to the extent to which the arid region might be redeemed by irrigation; it provided for the selection of sites for reservoirs for the storage and utilization of water for irrigation and the prevention of overflows, and that the lands designated for reservoirs, ditches or canals, and all lands susceptible for irrigation therefrom be reserved from sale or entry. (1 Sup. R. S. 698.) In 1890 the reservation from sale or entry of lands, except as to reservoir sites was repealed, reservoir sites remained segregated. (1 Sup. R. S. 791-792.) In the same year it was provided that patents for lands west of the 100th meridian should reserve the right of way for ditches and canals. (1 Sup. R. S. 792.) In 1892 public lands were opened to private location for the right of way to the extent of the ground occupied by the water of the reservoir, canals and laterals and fifty [feet] on the margin. In this Act it was provided that "the privilege herein granted shall not be construed to interfere with the control of the water for irrigation and other purposes under authority of the respective states or territories." (1 Sup. R. S. 946.) On the 26th day of February, 1897, Congress opened the reservoir

sites, reserved by the Government under the Act of 1891, to private location, and the local legislators were authorized to prescribe rules and regulations and fix water charges.

From these Acts two things are manifest, that (1) the use of the water for irrigation purposes was authorized; and (2) that the local laws should govern the use of that water for such purposes. In harmony with this use the Interior Department holds that in granting the right of way for reservoirs and canals it does not and cannot assume to determine or prescribe water rights, and that the flow and the use of the water is a matter exclusively under state or territorial control. Decision Interior Department, Vol. 18, p. 168.

"The region in which agriculture depends on irrigation includes about four-tenths of the entire area of the United States, not including Alaska." Report of Director of Geological Survey to Secretary of Interior, March 13, 1888. Throughout the vast tract classed as the arid region extending west from about the 100th parallel there is little or no use for water for navigation, but the cultivation of millions of acres of land is necessarily dependent upon the use of it. The authority to grant permission to divert waters for such purpose is not given to the Secretary of War, neither is it given to any one else. Yet if such water cannot be diverted, millions of acres now in cultivation must be turned back, a waste country, or the cultivation continued in violation of law, civil and criminal. These may be said to be considerations of policy with which the courts have nothing to do. If the law be clear this is undoubtedly true, and the courts must administer it; but in ascertaining what the law is we cannot refrain from examining the path we are invited to pursue. The

hardships and inconveniences which would result, not simply in an individual case, but from the establishment of a rule, is an argument against it. And, after all, there is much soundness in the observation of one of the foremost of American jurists, that the growth of the law is in truth legislative. "The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean of course considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis." Holmes' Com. Law, Lec. 1, p. 35. The Genesee Chief case is an illustration of this. There the court disregarded the arbitrary distinction in respect to the ebb and flow of the tide suitable to conditions in England, and which had been followed in the earlier cases in the United States, and it was held that the admiralty and maritime jurisdiction of the United States extended to the great lakes and rivers without limit as to the tide, and that this jurisdiction was not founded upon the clauses of the Constitution in respect to regulating commerce, but solely by virtue of its admiralty and maritime power. The English rule was appropriate enough, until the application of steam power to navigation opened the great rivers to commerce. (12th How. 450.)

Considering the discussion in Congress, the reports of committees, and the labors and reports of officials

in the Interior and War Departments, made under congressional directions, it seems quite manifest that the purpose by the Federal Government to hold and further redeem the great arid region, had become the recognized policy and the measure of the highest public importance and necessity. It would seem that at first it was the design to establish and maintain an elaborate system of irrigation at public expense, but the immense cost of such an enterprise seems to have induced its abandonment, temporarily, at least, and in its stead another system has been provided by irrigation at private cost. The system may be incomplete in many of its details, but such as it is, reservoir sites have been located, surveyed and established along the streams, navigable and non-navigable, under the immediate direction of government officials and by authority of Congress, and the right to make private entries of others under the supervision of the Secretary of the Interior is also authorized.

Ruins of extensive irrigation systems scattered all over New Mexico and Arizona of a pre-historic people show that conditions which have confronted the present age were conditions encountered in the remote past and apparently overcome. The cultivation of the Rio Grande Valley by acequias from the river is mentioned by the earliest of Spanish priests and explorers, and is established by authentic historical memorials extending back more than two centuries. The law of prior appropriation existed under the Mexican Republic at the time of the acquisition of New Mexico, and one of the first acts of this government was to declare that, "The laws heretofore in force concerning water courses \* \* \* shall continue in force." Code proclaimed by Brigadier General Kerney, September 22nd. 1846.

One of the first acts of the local legislature (1852) after the organization of the Territory, provided that, "All rivers and streams of water in this Territory, formerly known as public ditches or acequias, are hereby established and declared to be public ditches or acequias." (Com. Laws Sec. 6.) In 1874, it was provided that "All of the inhabitants of the Territory of New Mexico, shall have the right to construct either private or common acequias, and to take the water for said acequias from wherever they can, with the distinct understanding to pay the owner through whose lands said acequias have to pass, a just compensation for the land used." (C. L. Sec. 17) In 1887, an Act was passed giving authority to corporations to construct reservoirs and canals, and for this purpose to take and divert the water of any stream, lake or spring, provided it does not interfere with prior appropriations. Session Acts 1887, Chap. 12. Other acts have passed since upon the subject, in regard to the acquisition of water rights. But this legislation is not peculiar to New Mexico; its general characteristics are common throughout the west, where the doctrine of prior appropriation prevails. This was the character of local legislation, which Congress recognized, confirmed and authorized by the various acts to which reference has been made. As an indication of the scarcity of the supply and of the great value attached to water, one of the early acts of the legislature prohibited the making of paths across the fields, as they were calculated to divert the flow of the water and injure acequias. The doctrine of prior appropriation has been the settled law of this Territory by legislation, custom and judicial decision. Indeed it is no figure of speech to say that agriculture and mining life of the whole country

depends upon the use of the waters for irrigation, and if rights can be acquired in waters not navigable, none can have greater antiquity and equity in their favor, than those which have been acquired in the Rio Grande Valley in New Mexico.

Therefore the diversion of such local waters is not a violation of any Act of Congress even though the navigable capacity of the river at a distance below, may become thereby impaired.

In conclusion it is therefore held that the Rio Grande is not a navigable river above El Paso, and that the waters thereof are local waters under local control, by the authority of Congress, and that their interruption and diversion is not a violation of any law of the United States or any treaty. In this view of the case it appears that the bill as amended is without equity and the injunction heretofore granted should be dissolved. It will be unnecessary to decide whether the waters of a navigable river may be diverted as that issue does not arise in this case. As the bill is without equity other questions which have been raised need not be considered.

GIDEON D. BANTZ,  
Judge and Chancellor.

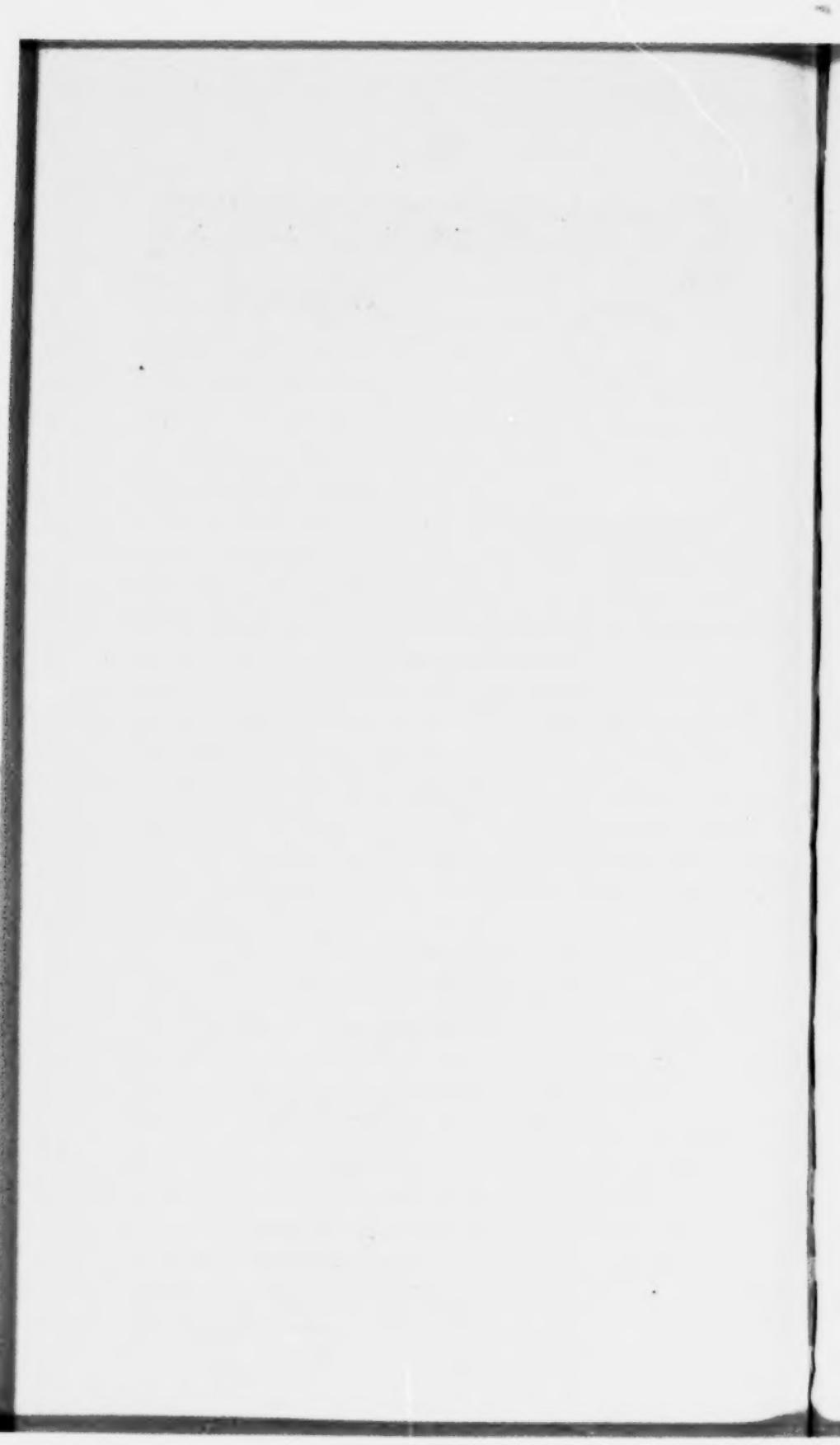
United States of America, Territory of New Mexico,  
Third Judicial District Court.

I, W. B. Walton, clerk of the United States District Court of the Third Judicial District of the Territory of New Mexico, do hereby certify that the foregoing and attached files are all of the original papers filed in my office in cause numbered 140 on the docket of said court, wherein the United States of America is complainant, and The Rio Grande Dam & Irrigation Company, et al., are defendants.

Witness my hand and the seal of said court, at Silver City, New Mexico, this thirteenth day of August, A. D., 1897.

[SEAL.]

W. B. WALTON,  
Clerk.



## APPENDIX.

The State of Texas,  
County of Cameron.

Before me, Emilio C. Forto, a notary public in and for said county and state, on this day appeared William Kelly, who, after being by me duly sworn, on oath, deposes and says:

My personal experience in steamboating on the Rio Grande, began in July 1865, when I was serving as depot quartermaster at Brazos Santiago, Texas, and had charge of transportation for supplying the forces of General Fred Steele (then commanding the Army of the Rio Grande) occupying the river between its mouth and Laredo. Since then I have been continuously engaged in steamboating on this river, either as manager or owner.

Since 1865 I have been an interested observer of the changes in the volume of water coming down the Rio Grande, as affecting its navigation, and having had from time to time in my employment captains, pilots, mates, engineers, and other boatmen who had served on the river in their several capacities during and since the Mexican war (1846-8), I became familiar with its history from that date.

My personal observation has shown me that from 1865 to about 1880 there was little or no change in the average depth of navigable water between Roma and the mouth of the river. Since 1880 the volume of water has steadily decreased and at present the river is not navigable above Brownsville, for boats drawing over

30 inches of water or having more than twenty-four feet beam, for more than four months of the year and the channel between Brownsville and the mouth is very little, if anything, better.

From 1865 to 1874 steamboats of 200 to 250 tons, drawing from five feet to five feet and six inches, ran from the mouth of the river to Brownsville all the year round. During the same period we ran boats drawing four feet to Rio Grande City, Camargo, Roma and Mier.

In 1874-5 the navigation between Brownsville and the mouth by steamboats was abandoned in consequence of the building of a narrow guage railroad from Brownsville to the Gulf, at Pt. Isabel (Brazos Santiago). From 1875 to date, I have kept boats running above Brownsville.

In 1880, we ceased to run above Rio Grande City, on account of shoaling water, and since that date no steamboat, except on a few occasions during freshets, has gone above that point. In 1885, I found that the river was permanently shoaling, and it was necessary to get a much smaller boat of lighter draft. The boat (the iron steamboat "Bessie" 100 tons) running to Rio Grande City at present, does not load to over 28 inches, and can only run to that point six or seven months in the year.

All steamboat men, and others, familiar with this river, with whom I have discussed the question, agree that chief cause of the decreasing water in the lower Rio Grande, is the fact, that the annual and semi-annual freshets from the headwaters of the stream no longer reach here in consequence of their being diverted for irrigation and other purposes. The confluentes of the Rio Grande in Mexico and Texas, (ex-

cept the Pecos) are small, and only supply water to the main stream spasmodically by freshets, seldom lasting over two or three days, and more frequently not so many hours. The steady supply came from the Rio Grande above El Paso, and that being cut off, or so seriously diminished, has not only destroyed the navigability of the lower river, but has turned tens of thousands of acres of heretofore cultivated and cultivable lands into arid wastes, for want of the flooding they used to receive from the headwaters twice every year.

The average rainfall at Brownsville and Rio Grande City (I have no data from points above) has not materially decreased in the last twenty years. The hospital records at Fort Brown show the mean for ten years, from 1871 to 1880, to have been 23.26 inches; from 1880 to 1890 to have been 24.32—the annual minimum during that period having been 17.19 inches in 1875, and the max. 30.14 in 1882. While we have had a period of draught for the four years previous to July, 1896, the shortage of rainfall has been during the spring and summer—the winter rains have been about normal. This shows that the decreasing volume of water in the lower Rio Grande is not due to local causes.

The freshets coming from the Rio Grande above El Paso, previous to 1880, kept the lower river in good boating order all year, and old boatmen would say of rises in the stream, "That is El Paso water," or "that is Pecos water," or "that is San Juan water," basing their judgment on the color of the water and character of the drift. For several years I have not heard anyone at Brownsville say, "that is El Paso water," meaning water coming from above El Paso.

It is quite clear to me that any further diminution of the supply coming from above El Paso, by dam or otherwise, will, in the course of a short time, render the lower Rio Grande unnavigable. I have no doubt that with the volume of water we had previous to 1880 the river could, with comparatively little expense (chiefly in removing the rocks that cause the rapids near Guerro), be made navigable for boats drawing four feet of water as high up as Laredo. Above that point I have no personal knowledge.

(Signed)

WILLIAM KELLY.

Sworn to and subscribed before me, by William Kelly  
on this the 20th day of July, 1897.

(Signed)

[SEAL]

EMILIO C. FORTO,

Notary Public in and for

Cameron County, Texas.

[Copy.]

154 And afterwards, to wit, on August 23rd, 1897, there was filed in the office of the clerk of said supreme court an assignment of errors, which said assignment of errors is in the words and figures following, to wit:

<b>UNITED STATES OF AMERICA, APPELLANT,</b> <i>vs.</i> <b>THE RIO GRANDE DAM AND IRRIGATION CO. ET AL.,</b>	}	No. 753.
appellees.		

*Assignment of errors.*

Now comes the appellant in the above-entitled cause and assigns, as error committed by the court below, the following, that is to say:

1. The court erred in holding that appellant's original and amended bill of complaint contained no grounds for an injunction.
2. The court erred in failing to pass upon and hold defendants' pleas insufficient.
3. The court erred in dismissing complainant's bill and dissolving the temporary injunction.

WILLIAM B. CHILDERS,  
U. S. Attorney for New Mexico.

155 And afterwards, to wit, on Tuesday, August 24th, A. D. 1897, at the said regular term of said supreme court, the following, among other proceedings, were had, to wit:

<b>UNITED STATES OF AMERICA, APPELLANT,</b> <i>vs.</i> <b>THE RIO GRANDE DAM AND IRRIGATION COM-</b>	}	No. 753. Appeal from the third judicial dis- trict court.
pany et al., appellees.		

This cause coming on to be heard upon the transcript of record, assignment of errors, and briefs of counsel on file, and the court hears argument by W. B. Childers, esq., for appellant, and A. B. Fall, W. A. Hawkins, and S. B. Newcomb, esqrs., for appellees, and the court, not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, to wit, on Wednesday, August 25th, 1897, at the said regular term of said supreme court, the following, among other proceedings, were had, to wit:

<b>UNITED STATES OF AMERICA, APPELLANT,</b> <i>vs.</i> <b>THE RIO GRANDE DAM AND IRRIGATION COM-</b>	}	No. 753. Appeal from the third judicial dis- trict court.
pany et al.		

This cause having been argued and submitted to and taken 156 under advisement by the court at a former day of the present term, and the court, being now sufficiently advised in the premises, announces its decision by Chief Justice Smith, Associate Justices Collier, Hamilton, and Loughlin concurring, Associate Justice Bantz not sitting, affirming the judgment of the court below, for reasons stated in open

court and that will appear more fully in the opinion to be filed herein. It is therefore ordered, adjudged, and decreed by the court that the judgment of the district court of the third judicial district in the Territory of New Mexico, whence this cause came into this court, be, and the same hereby is, affirmed, and in accordance with said judgment of said district court it is ordered, adjudged, and decreed that the said injunction, heretofore issued herein, be dissolved and that said cause be, and the same hereby is, dismissed and that the said defendants do have and recover their reasonable costs herein, as well in the court below as in this court, to be taxed, for which let execution issue; and thereupon the appellant herein, by her attorney, William B. Childers, esq., prays an appeal to the Supreme Court of the United States from the judgment and decision of this court. It is therefore ordered that the appellant herein be, and hereby is, allowed an appeal to the Supreme Court of the United States from this judgment and decision.

## TERRITORY OF NEW MEXICO,

*Supreme Court, ss:*

I, Geo. L. Wyllys, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the above and foregoing is a full, true, and perfect transcript of the record, assignments of error, and all proceedings had in a certain cause lately pending in said supreme court, wherein the United States of America was appellant and the Rio Grande Dam & Irrigation Company et al. were appellees, as the same remains on file and of record in my office; and I further certify that the three maps hereto attached and marked Exhibits E, D, & C, respectively, are the original maps filed in my office as exhibits in said cause, and directed by the United States attorney for the Territory of New Mexico to be forwarded with this transcript to the Attorney-General of the United States, to be used on the hearing of said cause in the Supreme Court of the United States.

Witness my hand and the seal of said supreme court this 1st day of November, A. D. 1897.

GEO. L. WYLLYS, Clerk.

## 158 THE UNITED STATES OF AMERICA.

*To the Rio Grande Dam and Irrigation Company and the Rio Grande Irrigation and Land Company, Limited, greeting:*

Whereas the United States of America has lately appealed to the Supreme Court of the United States from a decree lately rendered in the supreme court of the Territory of New Mexico in favor of you, the said The Rio Grande Dam & Irrigation Company and the Rio Grande Irrigation & Land Company, Limited, which said decree so appealed from was rendered on the 25th day of August, 1897, in a certain cause then pending in said supreme court of said Territory wherein the United States of America was plaintiff and appellant, and you, the said Rio Grande Dam & Irrigation Company and the said Rio Grande Irrigation & Land Company, Limited, were defendants and appellees:

You are therefore cited to be and appear before the said Supreme Court of the United States, at the city of Washington, on the twenty-fourth day of January, A. D. 1898, to do and receive what may appertain to justice to be done in the premises.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 23rd day of November, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States of America the 121st.

THOMAS SMITH,

*Chief Justice of the Supreme Court of the Territory of New Mexico.*

Service of above citation acknowledged by delivery of a copy thereof upon this the 26th day of November, A. D. 1897, and the appellees hereby agree to enter their appearance in said cause.

S. B. NEWCOMB,

*Counsel for Appellees.*

(Indorsed:) Filed in my office this Nov. 27, 1897. Geo. L. Wyllys, clerk.

159 In the Supreme Court of the United States of America.

THE UNITED STATES OF AMERICA, APPELLANT,  
*v.s.*  
 THE RIO GRANDE DAM & IRRIGATION COMPANY and the Rio Grande Irrigation & Land Company, Limited, appellees.

*Stipulation.*

It is hereby stipulated and agreed by and between the appellant and the appellees in the above-entitled cause, that no opinion has yet been rendered and filed in the supreme court of the Territory of New Mexico in said cause; that a decree affirming the decree of the district court was rendered in the supreme court, the court announcing its intention to file an opinion thereafter, but which said opinion has not as yet been filed;

And it is further stipulated, that the record in said cause may be considered as showing this fact, that any statement in the record in conflict therewith is a mistake made by inadvertence.

It is further stipulated, that if any opinion may be filed by the supreme court of the Territory of New Mexico, that the clerk may certify a copy of the same, and it may be filed and be taken as a part of the record in this case.

*Counsel for Appellants.*

S. B. NEWCOMB,

*Counsel for Appellees.*

(Indorsed:) Filed in my office this Nov. 27, 1897. Geo. L. Wyllys, clerk.

160 TERRITORY OF NEW MEXICO,

*In the Supreme Court:*

I, George L. Wyllys, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the above and foregoing is a full, true, and perfect transcript of the record, assignments of error, and all

proceedings had in a certain cause lately pending in said supreme court, wherein the United States of America was appellant and the Rio Grande Dam and Irrigation Company et al. were appellees, as the same remains on file and of record in my office; and I further certify that the three maps hereto attached and marked Exhibits E, D, and C, respectively, are the original maps filed in my office as exhibits in said cause and directed by the United States attorney for the Territory of New Mexico to be forwarded with this transcript to the Attorney-General of the United States to be used on the hearing of said cause in the Supreme Court of the United States. And I do further certify that up to the time of the dating of this certificate no opinion by the court has yet been filed in said cause in the supreme court of the Territory of New Mexico; and I do further certify that the order granting an appeal therein was taken in open court at an adjourned session of the July term of the said supreme court; and I further certify that since the taking of said appeal assignments of error were signed and issued and duly returned, together with a stipulation in said cause, which is also appended, next preceding this certificate, as a part of the record therein.

Witness my hand and the seal of said supreme court this 11th day of December, 1897.

[SEAL.]

GEO. L. WYLLYS, Clerk.

(Indorsement on cover:) Case No. 16756. New Mexico Territory, supreme court. Term No., 543. The United States, appellant, vs. The Rio Grande Dam and Irrigation Company and The Rio Grande Irrigation & Land Company, Limited. Filed December 21st, 1897. Office Supreme Court of U. S. Received December 21, 1897.



# SUPREME COURT OF NEW MEXICO.

JULY TERM, 1897.

No. 753.

THE UNITED STATES OF AMERICA, APPELLANT,  
vs.  
THE RIO GRANDE DAM AND IRRIGATION COMPANY et al., appellee. } Appeal from the  
third judicial district court.

This is a suit in equity brought by the United States to restrain the Rio Grande Dam & Irrigation Company from constructing or maintaining a dam across the Rio Grande River, in the Territory of New Mexico. The structure especially aimed at is a dam projected and about to be built by the defendant company at a point called Elephant Butte, the object of which is to take water from the river, and store it in reservoirs, for the purpose of irrigation. The ground upon which the claim of the Government is predicated is that the Rio Grande is a navigable river, and that the proposed dam will obstruct the navigation of the river, the flow of waters therein, and interfere with its navigable capacity, and that such obstructions would be contrary to the treaty with Mexico, and in violation of the acts of Congress.

2 A preliminary injunction was granted and defendant ordered to show cause why it should not be continued. The defendant answered, denying that the Rio Grande is a navigable river, and also filed pleas justifying under its right of way for canals and reservoirs secured under the act of Congress of 1891 and certain Territorial laws. Upon the hearing, the court below held that upon the facts presented by affidavit, as well as other facts of which it took judicial notice, the Rio Grande is not a navigable stream within the Territory of New Mexico, and that the bill does not state a case entitling it to the relief prayed; and upon the complainant's declining to amend its bill further the court dissolved the injunction and dismissed the bill. From that judgment the United States appealed to this court.

The right of the United States to prevent the construction of the irrigation works in question is sought to be deduced chiefly from two acts of Congress, viz.:

1. The act of September 19, 1890, sec. 10, which prohibits "the creation of any obstruction, not affirmatively authorized by law, to the

navigable capacity of any waters in respect to which the United States has jurisdiction."

2. The act of July 13, 1892, sec. 3, which declares that it shall not be lawful "to build any \* \* \* dam, pier, \* \* \* or structure of any kind \* \* \* in any navigable waters of the United States \* \* \* without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said water."

3 Some allusion has been made to the treaty of Guadalupe Hidalgo of 1848, between the United States and Mexico, as containing stipulations which would be violated by permitting the contemplated construction to proceed. The only provision of that treaty bearing upon this subject simply provides in article 7, that the part of the Rio Grande lying below the southern boundary of New Mexico is divided in the middle between the two Republics, and that the navigation below said boundary "shall be free and common to the vessels and citizens of both countries, and neither shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right." Manifestly this applied only to that portion of the river below the boundary of New Mexico, for the same article contains the further qualifying clause that—

"The stipulations contained in the present article shall not impair the territorial rights of either Republic within its established limits."

Furthermore, the treaty of 1854, known as the Gadsden treaty, contains an express provision that the stipulations and restrictions of the 7th article of the treaty of Guadalupe Hidalgo shall remain in force only so far as regards the Rio Grande "below the intersection of the 31 degree, 57 min., 30 sec., parallel of latitude with the boundary line established by that treaty."

There is no undertaking by either of the parties to these treaties that the Rio Grande is, or shall continue to be, navigable. All that either agreed to in this connection was that it would not construct, below the point of intersection of the above-mentioned parallel of latitude, which is about that of El Paso, any work which would interfere with the common use of the river. No obligation devolved upon the United States to conserve the waters of the river above that point for the purpose of facilitating navigation below it.

4 We think the whole question turns upon the applicability of the acts of Congress above mentioned. By their express terms these acts deal only with navigable waters. Unless the Rio Grande is a navigable stream, and its "navigation," or "navigable capacity" will be obstructed by the proposed dam, these statutes do not apply to the case, and can not be invoked to enable the Government to stop the progress of the work by injunction.

It is alleged in the original bill that the Rio Grande, from and including the site of the proposed dam, has been used to float logs for commercial and business purposes and for affording a means for commercial traffic within and between the Territory of New Mexico and the State of Texas and the Republic of Mexico. In the amended bill it is alleged that the said river is susceptible of navigation for commercial purposes

up to La Joya, in the Territory of New Mexico, about one hundred miles above Elephant Butte. In both, the river is alleged to be navigable at certain points below El Paso.

It is conceded that the navigability of waters is a matter of which courts take judicial notice. The record contains a large mass of information, in the form of maps, reports of exploring and surveying expeditions made under the direction of the War and Interior Departments, and also reports of officers specially detailed to investigate the feasibility of rendering the river commercially navigable by improvements, and also its capability of supplying reservoirs for irrigation.

From these and other data the following facts, as stated in the opinion of the court below, are well established:

5        The course of the Rio Grande in New Mexico is through rocky canons and sandy valleys; in the valleys it spreads out shallow and between low banks; over fine, light, sandy soil of great depth; bars are continually forming, passing away, and re-forming, and the quicksands in the bed of the stream and along its margin are perilous to life. The fall is from four to fifty-two feet to the mile, and the changes in its course are rapid, continual, and often radical; the valley is scarred with low ravines, made by its progress in different places. In all the period of time only two instances were shown where the river was actually utilized for the conveyance of merchandise, and these were of timbers; one of these instances occurred in 1858 or 1859, when a raft was sent down from Canutillo to El Paso, a distance of 12 miles; and the other recently, when some telegraph poles were floated from La Joya, a "short distance." "The water of the stream, especially in central and southern New Mexico, is heavily loaded with silt. The channel of the river through these valleys is usually choked with sand, and in times of low water the stream divided into a number of minor channels, and apparently a large percentage of the water is lost in these great deposits of fine material." (12 Annual Rept. Geol. Sur., 204.) "From Bernalillo (N. M.) to Fort Hancock (Tex.) the Rio Grande is in the highest degree spasmodic, with immense floods during a few weeks of the year and a small stream during the remainder of it." (10 Annual Rept. Geol. Sur., p. 99.) "From personal observation, I know that these seasons of flood and drouth (in the Rio Grande) were of about the same character 30 years ago." (Maj. Anson Mills, 10 U. S. Cav. Rept. Spec. Com. Sen., vols. 3 and 4, p. 39.) But what is of more importance, we have reports of officials upon the exploration of the river, made under the direction of the Government, for the special purpose of considering its navigability. From these it appears:

6        "The stream is not now navigable, and it cannot be made so by open-channel improvement. An accurate survey and hydrometric observations would be necessary to determine positively whether an improvement by locks and dams could be made or not, but the heavy fall of the river, the lowness of its banks, and the small discharge do not encourage the belief that such improvement would be financially, even if physically, practicable. Certainly there is no public interest which would justify the expenditure of the many millions of dollars which such an improvement would involve. The irrigation of the valley is a matter in which the inhabitants are now deeply interested, while the possible navigation of the river receives little or no attention from them. \* \* \*

In my judgment the stream is not worthy of improvement by the General Government." (Report of O. H. Ernst, major of Engineers, to Secretary of War, 1889.) Again: "I consider the construction, not only of an open river channel, but of any navigable channel, to be impracticable. \* \* \* During the greatest part of the year, when the river is low, the discharge would be insufficient to supply any navigable channel, except perhaps a narrow canal, with locks, the construction of which on a foundation of sand, in places forty feet deep, would be financially, if not physically, impracticable." (Report of Gerald Bagnall, assistant engineer, to Secretary of War, 1889.)

The navigability of a river does not depend upon its susceptibility of being so improved by high engineering skill and the expenditures of vast sums of money, but upon its natural present conditions. In the Daniel Ball (10 Wallace, 557) the Supreme Court says: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact, and they are navigable in fact when they are used or are susceptible of being used, in the ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in

the customary modes of trade and travel on water." In the  
7 Montello (20 Wallace, 431) the court says: "If it be capable in its natural state of being used for purposes of commerce, no matter in what mode that commerce may be conducted, it is navigable in fact and becomes a public river or highway. \* \* \* The vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce." The court approves the language of Chief Justice Shaw, in 21 Pickering, 344, who said: "In order to give it the character of a navigable stream it must be generally and commonly useful to some trade or agriculture." See also Morrison vs. Coleman (Ala.) (3 L. R. A., 334). Of course it need not be perennially navigable, but the seasons of navigability must occur regularly and be of sufficient duration and character to subserve a useful public purpose for commercial intercourse. While the capacity of a stream for floating logs or even thin boards may be considered, yet the essential quality is that the capacity should be such as to subserve a useful public purpose. (Angell Water Courses, 335.) In a recent case the supreme court of Oregon says, per Thayer, C. J.: "Whether the creek in question is navigable or not for the purposes for which appellant used it, depends upon its capacity in a natural state to float logs and timber, and whether its use for that purpose will be an advantage to the public. If its location is such and its length and capacity so limited that it will only accommodate but a few persons it can not be considered a navigable stream for any purpose. It must be so situated and have such length and capacity as will enable it to accommodate the public generally as a means of transportation." And in the same case Lord, J., said: "It must be susceptible of beneficial use to the public," be "capable of such floatage as is of practical utility and benefit to the public as a highway." And of the stream then in question he says: "It is not only not adapted to public use, but the public have made no attempt to use it for any purpose." (Haines vs. Hall (Oregon), 3 L. R. A., 609.)

8 The supreme court of Alabama says: "In determining the character of a stream inquiry should be made as to the following points: Whether it be

fitted for valuable floatage; whether the public or only a few individuals are interested in transportation; whether any great public interests are involved in the use of it for transportation; whether the periods of its capacity for floatage are sufficiently long to make it susceptible of use beneficially to the public. (*Roads vs. Otis*, 33 Ala., 578; *Peters vs. N. O., M. & C. R. Co.*, 56 Ala., 523.) Indeed, in the letter of inquiry by the Honorable Richard Olney, Secretary of State, in respect to the facts as to the navigability of the Rio Grande, in interstate commerce among other essential qualities, he says: "It should be remembered that a mere capacity to float a log or a boat will not alone make a river navigable. The question is, whether the river can be used profitably for merchandise. I have been informed that wood is sometimes brought down the river to Ciudad Juarez in flat-boats and that logs are rafted or floated down from the timbered lands on the upper river for commercial purposes." (Letter January 4, 1897). The Secretary of State seems to have been misinformed as to such use for commerce. This letter was addressed to Col. Anson Mills, at whose request it appears that applications for right of way for irrigation by the use of waters of the Rio Grande and all its tributaries were suspended throughout New Mexico and Colorado. The answer of Col. Mills deals almost wholly with the river internationally; the river in its relation to interstate commerce is dismissed by him with the instance of the floating of a raft of logs in 1859 from a point 18 miles above El Paso, and the qualifying remark "it would now hardly be practicable to do so."

(Letter January 7th, 1897.)

9 It is perfectly clear that the Rio Grande above El Paso has never been used as a navigable stream for commercial intercourse in any manner whatever, and that it is not now capable of being so used. On the other hand it has been, from the earliest times of which we have any knowledge, used as a source of water for irrigation. Its valley has always been the center of population in New Mexico. It was the first portion of this region to be occupied and settled by civilized men, and the population of this valley has always been, and is now, absolutely dependent for means of livelihood and subsistence upon the use of the waters of this river for irrigation of their fields and crops. Dams have been erected and maintained at El Paso for nearly 200 years, by which the river has been obstructed and its waters diverted for irrigation to both sides of the Rio Grande. But never until the present time, so far as we can ascertain, has any question been raised by anyone as to interference with any use of the river for purposes of navigation. Indeed, it appears from the affidavits and reports presented in support of the bill in this case that the objection now raised to the construction of the defendant's dam grows out of the proposed construction of an international dam and reservoir at El Paso, to be constructed under the auspices of the two Governments. The investigation of the feasibility of such an international dam and reservoir is being made on behalf of the United States under the authority of Congress, thus evincing the deliberate intention of the Government, by its political department, to take measures, not for the purpose of improving the navigability of this river, but of permanently obstructing it at a point far below the site of defendant's works, and thus to devote the stream to irrigation instead of navigation. One of the affi-

10 davits in support of the bill is made by the commissioner of the United States engaged upon this investigation, the object of which he states to be "the study of a feasible project for the equitable distribution of the waters of the Rio Grande to all persons residing on its banks or tributaries having equitable interests therein." And he also states in one of his reports that "the probable flow of water in the river here (El Paso) is likely to be ample for the supply of the proposed international reservoir, \* \* \* \* but that the flow will not be sufficient to supply the proposed international reservoir here and allow for the supply for the proposed reservoir of the Rio Grande Irrigation Company, at Elephant Butte, in New Mexico, or any other similar reservoirs in New Mexico, and but one of these schemes can be successfully carried out."

That is to say, in order to render feasible the storage of water for irrigation at El Paso, it is essential to prohibit all similar structures along the river at points above.

From these extracts it seems clearly apparent that the work at El Paso, to which the United States has committed itself, tentatively, at least, is not designed to preserve or improve the navigable capacity of the river, but to facilitate the distribution of the waters which may be gathered by obstructing the stream for the benefit of riparian occupants, and that the object of this proceeding is not to secure a public benefit from the navigation of the Rio Grande, but rather, under the guise of a question of navigability of the stream, to obtain an adjudication of the interests of rival irrigation schemes, in aid of one locality against another.

Manifestly neither the acts of Congress cited nor the provisions of the treaty have any application to questions of this kind, and they can not be invoked to settle conflicting local interests whose determination must necessarily depend upon entirely different considerations.

11 The Rio Grande, as we have said, flows through a region dependent upon irrigation. It is a part of what is known as the arid region of this country, embracing, according to the report of the Director of the Geological Survey, about four-tenths of the entire area of the United States, in which the rainfall is not sufficient for the production of crops. Here the paramount interest is not the navigation of the streams, but the cultivation of the soil by means of irrigation. Even if, by the expenditure of vast sums of money in straightening and deepening the channels, the uncertain and irregular streams of this arid region could be rendered to a limited extent navigable, no important public purpose would be subserved by it. Ample facilities for transportation, adequate to all the requirements of commerce, are furnished by the railroads, with which these comparatively insignificant streams could not compete. But on the other hand, the use of the waters of all these streams for irrigation is a matter of the highest necessity to the people inhabiting this region, and if such use were denied them, it would injuriously affect their business and prosperity to an extent that would be an immeasurable public calamity. These conditions have been distinctly recognized in the legislation of Congress, for while it has refrained from any attempt to render streams like the Rio Grande navigable by artificial works, and has not in any way treated them as navigable waters, Congress has, by the reservation or survey of reservoir

sites along its valley, and the appropriation of large sums of money for the prosecution of investigations and surveys to this end, clearly indicated its purpose to treat these waters as suitable only for irrigation, and to consider such a use of them as the one of commanding importance.

12      The riparian rights of the United States were surrendered in 1866 (R. S., 2339); prior to that time it had become established that the common-law doctrine of riparian rights was unfitted to the conditions in the far West, and new rules had grown up under local legislation and customs more nearly analogous to the civil law. Recognizing that the public domain could not be utilized for agricultural and mining purposes without the use of water applied by artificial means, and that vast interests had grown up under the presumed license of the Federal Government to the use of such waters, Congress confirmed the rights of prior appropriation of waters, by the act above mentioned, where the same "are recognized and acknowledged by the local customs, laws, and decisions of the courts." (See. 2339.) The Supreme Court of the United States, in passing upon this act, observes, "It is evident that Congress intended, although the language used is not happy, to recognize as valid the customary law with respect to the use of the water which had grown up among the occupants of the public lands under the peculiar necessities of their condition." (Atchison vs. Peterson, 20 Wal., 507; Basey vs. Gallagher, 20 Wal., 671.) And since 1870 patents for lands expressly except vested water rights.

Congress has manifested a purpose to extend the largest liberty of use of waters in the reclamation of the arid region under local regulative control. Following in line with the act of 1866 the act of 1877 authorized the entry of desert lands in the arid region by those who intend to reclaim them by conducting water upon them. This act again distinctly recognized the validity of the right of prior appropriation, and also provided that "All surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of

water supply upon the public lands and not navigable shall remain 13 and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights." This act was limited to States and Territories in the arid region. (1 Supp. R. S., p. 137.) Colorado was included in 1891. (1 Supp. R. S., pp. 249-241.) By the act of 1888 (an appropriation bill) an investigation was directed as to the extent to which the arid region might be redeemed by irrigation; it provided for the selection of sites for reservoirs for the storage and utilization of water for irrigation and the prevention of overflows, and that the lands designated for reservoirs, ditches, or canals, and all lands susceptible for irrigation therefrom be reserved from sale or entry. (1 Supp. R. S., 698.) In 1890 the reservation from sale or entry of lands, except as to reservoir sites, was repealed, reservoir sites remained segregated. (1 Supp. R. S., 791-792.) In the same year it was provided that patents for lands west of the 100th meridian should reserve the right of way for ditches and canals. (1 Supp. R. S., 792.) In 1892 public lands were opened to private location for the right of way to the extent of the ground occupied by the water of the reservoir, canals, and laterals and fifty (feet) on the margin. In this act it was provided that "the privilege herein granted shall not be construed

to interfere with the control of the water for irrigation and other purposes under authority of the respective States or Territories." (1 Supp. R. S., 946.) On the 26th day of February, 1897, Congress opened the reservoir sites, reserved by the Government under the act of 1891, to private location, and the local legislators were authorized to prescribe rules and regulations and fix water charges. (Decision Interior Department, Vol. 18, p. 168.)

Considering the discussions in Congress, the reports of committees, and the labors and reports of officials in the Interior and War  
14 Departments, made under Congressional directions, it seems quite manifest that the purpose by the Federal Government to hold and further redeem the great arid region, had become the recognized policy and the measure of the highest public importance and necessity. It would seem that at first it was the design to establish and maintain an elaborate system of irrigation at public expense, but the immense cost of such an enterprise seems to have induced its abandonment, temporarily, at least, and in its stead another system has been provided by irrigation at private cost. The system may be incomplete in many of its details, but such as it is, reservoir sites have been located, surveyed, and established along the streams, navigable and nonnavigable, under the immediate direction of Government officials and by authority of Congress, and the right to make private entries of others under the supervision of the Secretary of the Interior is also authorized.

Ruins of extensive irrigation systems scattered all over New Mexico and Arizona of a prehistoric people show that conditions which have confronted the present age were conditions encountered in the remote past and apparently overcome. The cultivation of the Rio Grande Valley by acequias from the river is mentioned by the earliest of Spanish priests and explorers, and is established by authentic historical memorials extending back more than two centuries. The law of prior appropriation existed under the Mexican Republic at the time of the acquisition of New Mexico, and one of the first acts of this Government was to declare that, "The laws heretofore in force concerning water courses \* \* \* shall continue in force." Code proclaimed by Brigadier-General Ker-

ney, September 22nd, 1846. One of the first acts of the local  
15 legislature (1852) after the organization of the Territory provided that, "All rivers and streams of water in this Territory, formerly known as public ditches or acequias, are hereby established and declared to be public ditches or acequias." (Com. Laws, sec. 6.) In 1874 it was provided that, "All of the inhabitants of the Territory of New Mexico shall have the right to construct either private or common acequias, and to take the water for said acequias from whereever they can, with the distinct understanding to pay the owner through whose lands said acequias have to pass a just compensation for the land used." (C. L., sec. 17.) In 1887 an act was passed giving authority to corporations to construct reservoirs and canals, and for this purpose to take and divert the water of any stream, lake, or spring, provided it does not interfere with prior appropriations. (Session Acts, 1887, chap. 12.) Other acts have been passed since upon the subject in regard to the acquisition of water rights. But this legislation is not peculiar to New Mexico; its general characteristics are common throughout the West, where the doctrine of prior appropriation prevails.

This was the character of local legislation which Congress recognized, confirmed, and authorized by the various acts to which reference has been made. The doctrine of prior appropriation has been the settled law of this Territory by legislation, custom, and judicial decision. Indeed, it is no figure of speech to say that agriculture and mining life of the whole country depends upon the use of the waters for irrigation; and if rights can be acquired in waters not navigable, none can have greater antiquity and equity in their favor than those which have been acquired in the Rio

Grande Valley in New Mexico.

16 It is contended that because the Rio Grande is capable of navigation to a limited extent several hundred miles below the point of the proposed dam its construction will, by arresting the flow of water in the stream, interfere with its navigable capacity and that it is therefore prohibited by the act of 1890. From the foregoing discussion of the legislation of Congress and the conditions prevailing in the region under consideration it would seem to follow that if there were a conflict between the interests of navigation and agriculture in relation to a stream like the Rio Grande that of the latter would prevail. Certainly it should be held to be under the protection of the courts against any doubtful interpretation or application of a penal statute. If the waters of the Rio Grande are not navigable in New Mexico, which we hold to be the case, then they can not be said to be waters in respect of which the United States has jurisdiction. And certainly in the absence of some express declaration to that effect it can not be supposed that Congress intended to strike down and destroy the most important resource of this vast region in order to promote the insignificant and questionable benefit of the navigation of the Rio Grande for a short distance above its mouth. For the construction contended for does not limit the prohibition of the act of Congress to the works proposed by the defendant. It applies to the maintenance as well as the original creation of obstructions. If defendant's dam at a point where the river is not navigable is an obstruction to the navigable capacity of the river several hundred miles below, the same must be said of every dam and irrigation ditch which diverts water from the river or any of its confluents to their primary sources. If upon this ground it is competent for the United States to prohibit

the erection of defendant's dam it is equally competent for it to  
17 compel the removal of every dam and headgate heretofore constructed in the Rio Grande and its tributaries and prohibit the use of their waters for irrigation throughout this entire valley. It is true that courts must administer the law as they find it, and if it is clear and free from doubt the consequences, however disastrous, cannot be considered as affording grounds for its non-enforcement. But in a case like this, where it is sought by intent to give to a statute a meaning not apparent on its face, it is the duty of the courts to give full weight to these considerations in determining what was the intention of Congress. And in view of the condition and history of the region which would be affected the unimportance of the Rio Grande as a waterway for commercial intercourse at any point, its non-navigability at the place of the proposed construction and for hundreds of miles below, and the evident purpose of Congress by its legislation to promote irrigation throughout this portion of the country, even to the extent of further obstruction of

this very stream, it would in our opinion be unreasonable to hold that legislation which has a definite and well-understood purpose in furtherance of the public interest in those portions of the country to whose conditions it is applicable was intended to operate to the detriment of the public interests in regions to whose conditions it is not applicable and where its enforcement would be destructive of the very interests which the legislation of Congress has otherwise undertaken to promote.

We therefore hold that the work sought to be enjoined in this action is not in violation of any law of the United States, or any treaty, and that the judgment of the district court dissolving the injunction and dismissing the bill should be affirmed, and it is so ordered.

THOMAS SMITH,  
*Chief Justice.*

I concur in the conclusion reached.

H. B. HAMILTON, A. J.  
N. B. LAUGHLIN, A. J.

18 In the supreme court of the Territory of New Mexico.

I, Geo. L. Wyllys, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the above and foregoing is a true copy of the opinion filed in my office in the cause lately pending in said court entitled The United States of America, appellant, vs. The Rio Grande Dam and Immigration Company et al., appellees, as the same appears on file and remains of record in my office, and which said opinion was filed on Jan'y 5th, A. D. 1898.

Witness my hand and the seal of the supreme court of the Territory of New Mexico this 5th day of January, A. D. 1898.

[SEAL.]

GEO. L. WYLLYS, Clerk.

19 (Indorsed:) No. 753. Supreme court of New Mexico. The United States of America, appellant, vs. The Rio Grande Dam & Irrigation Co. et al., appellees. Appeal from the 3rd judicial district. Opinion. Filed in my office this Jan'y 5th, 1898. Geo. L. Wyllys, clerk.

20 (Indorsed on cover:) Case No. 16756. Supreme Court U. S., October term, 1897. Term No. 543. The United States, app't, vs. The Rio Grande Dam & Irrigation Co. et al. Certified copy of opinion of sup. court of New Mexico. Filed January 17, 1898.

